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## THE UNITED STATES SUPREME COURT: 1949-50\*

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*"We depart from a great tradition. . . ."*

—DOUGLAS, J., DISSENTING.‡

JUSTICES MURPHY AND RUTLEDGE died, were buried, were mourned—and were replaced. Justice Douglas was absent most of the term with an injury. On October 3, 1949, at the first session of the new term, Chief Justice Vinson concluded his memorial remarks with the words, "Saddened by our losses but inspired by the examples of devotion to duty which Mr. Justice Murphy and Mr. Justice Rutledge have provided for us, we turn to the work before us."<sup>1</sup> By the first opinion day, the bar knew that the "work before us" consisted, in substantial part, of rejecting the work and the philosophy of the late justices.

Since chance had spun the wheel, it was appropriate that the symbol of change should be a pin-ball machine. It was a super pin-ball machine, product of one Gibbs, putting together several of the common games so that players could compete simultaneously, without having to wait their

\* This article is the fourth in an annual series and is written in part for the legal, social, and economic historians of the future who may find it useful to have a contemporary view of the work of the Supreme Court at the last term. The preceding articles on the 1946 Term, 15 Univ. Chi. L. Rev. 1 (1947); 1947 Term, 16 Univ. Chi. L. Rev. 1 (1948); and 1948 Term, 17 Univ. Chi. L. Rev. 1 (1949), will hereafter be cited by the date of the Term, i.e., 1946 Term article.

† Associate Professor of Law, Yale University. The author had a remote connection as counsel with two cases referred to in passing in this article, and participated on an amicus brief in connection with one of the segregation cases discussed below.

‡ Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 840 (1950) (apropos a patent point).

<sup>1</sup> 338 U.S. VIII, II (1949).

turn. A district court and the ninth circuit had held this small-bore "flash of genius" worthy of a patent as a combination. On March 28, 1949, the Supreme Court granted certiorari.<sup>2</sup>

It takes four votes to grant certiorari. We shall never know; but if it could be proved, it would seem a safe wager that those four were Black, Douglas, Murphy, and Rutledge. It was their kind of case.

On October 12, 1949, the matter was argued, and on November 7, 1949, the first decision day, it was decided. With Murphy and Rutledge gone, and Douglas away, the case no longer presented enough of an intellectual problem to the Court to warrant discussion. A brief per curiam upheld the invention and its claims, with only Justice Black dissenting.<sup>3</sup>

The docket of decided cases was a small one, perhaps the smallest in a century. Of the 94 opinions, two clearly overruled opinions of Justice Murphy.<sup>4</sup> A law review article is no substitute for a seance, and this next observation of course cannot be proved; but it is very probable that at least twelve more cases would have come to opposite results if Murphy, Rutledge and Douglas had been voting,<sup>5</sup> and it is quite possible that four more might have reached different conclusions.<sup>6</sup> These cases constitute twenty per cent of the year's decisions; significantly, most of these cases resulted in restrictions of civil rights. They were the most colorful part of a term otherwise only rarely spectacular. Perhaps two dozen opinions, the smallest number since this series of articles was begun, are of sufficient general importance to have any lasting significance, though a vital free speech case and the segregation cases are enough to make the term memorable.<sup>7</sup> The principal spectacle of 1949-1950 was Leviathan—turning.

<sup>2</sup> *Faulkner v. Gibbs*, 170 F. 2d 34 (C.A. 9, 1948), cert. granted, 336 U.S. 935 (1949).

<sup>3</sup> 338 U.S. 267 (1949).

<sup>4</sup> *Darr v. Burford*, 339 U.S. 200 (1950); *United States v. Rabinowitz*, 339 U.S. 56 (1950).

<sup>5</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *Darr v. Burford*, 339 U.S. 200 (1950); *Dennis v. United States*, 339 U.S. 162 (1950); *Int. Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950); *United States v. Alpers*, 338 U.S. 680 (1950); *United States v. Bryan*, 339 U.S. 323 (1950); *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521 (1950); *United States v. Fleischmann*, 339 U.S. 349 (1950); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

<sup>6</sup> *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950); *Faulkner v. Gibbs*, 170 F. 2d 34 (C.A. 9th, 1948), cert. granted 336 U.S. 935 (1949); *Graver Tank & Mfg. Co. v. Linde Air Products*, 339 U.S. 605 (1950); *Manufacturer's Trust Co. v. Becker*, 338 U.S. 304 (1949).

<sup>7</sup> For citations, consult the section immediately below.

## I. HIGH SPOTS OF THE YEAR

The five major opinions of the year all involved civil rights, though two also involved labor relations. Three of the five, each by Chief Justice Vinson, were of particular significance. The first of the major Vinson opinions was *American Communications Ass'n v. Douds*,<sup>8</sup> upholding the non-Communist affidavit provision of the Taft-Hartley Act. The opinion would not have been so important were it not for its dicta, which undermines much that Holmes, Brandeis, Hughes and their successors had done for thirty years to develop the "clear and present danger" test. This was the first major defeat for freedom of speech in the Supreme Court since Chief Justice Hughes and Justice Roberts, coming to the Court in 1930, had reversed the trend of the Taft, Sutherland, Sanford Court.

The other two major Vinson opinions involved segregation in graduate education. In *Sweatt v. Painter*,<sup>9</sup> and *McLaurin v. Oklahoma*,<sup>10</sup> a unanimous Court declined the invitation of counsel for the Negroes to reconsider the entire legal basis of segregation in the United States; but it did hit hard against segregation in graduate education by requiring that separate schools be truly equal. The nature of legal education is such, held the Court, that segregation in that field cannot be permitted at all, and when a Negro student is admitted to a white university, he may not be subjected to any racial distinctions. The dicta here, and in a related case involving dining car segregation,<sup>11</sup> may foretell an eventual reconsideration of the fundamentals of "separate but equal."

The decline and fall of *Thornhill v. Alabama*,<sup>12</sup> and with it the First Amendment as a serious protection of picketing, was completed this year in *International Brotherhood of Teamsters v. Hanke*.<sup>13</sup> The majority's opinion, by Justice Frankfurter, reduced the right of peaceful picketing to a case-by-case determination of whether, in all the circumstances, it is "reasonable" to allow that conduct. The judgment to be made becomes so complex that a strike is scarcely likely to survive the determination by a hierarchy of courts.

Last of the most significant cases is *United States v. Rabinowitz*.<sup>14</sup> For several years, one of the hardest fought Supreme Court issues has been the extent of the "search and seizure" limitation upon police conduct. Two years ago the Court required a search warrant whenever it was reasonably possible to get one. In *Rabinowitz*, a majority opinion by Justice

<sup>8</sup> 339 U.S. 382 (1950).<sup>9</sup> 339 U.S. 629 (1950).<sup>10</sup> 339 U.S. 637 (1950).<sup>11</sup> *Henderson v. United States*, 339 U.S. 816 (1950).<sup>12</sup> 310 U.S. 88 (1940).<sup>13</sup> 339 U.S. 470 (1950).<sup>14</sup> 339 U.S. 56 (1950).

Minton overruled that precedent. A legal pendulum, which had already been swinging crazily, thus took another wild swerve, though, it will be argued below, not necessarily a particularly undesirable one.

Taking these opinions apart individually may obscure the dominant motif of the year, which can be seen only in a totality. The segregation cases were unanimous. In the fifteen other civil rights cases this year the new Court divided. In fourteen of these cases, it rejected the claimed right. In numerous other civil rights cases, it denied certiorari. This broad jump to the right in respect to civil liberties was the most important new development of the year.<sup>15</sup>

## II. REGULATION OF LABOR AND BUSINESS

### LABOR

The most important labor cases involved picketing and state legislation limiting the right to strike. There were, as always, lesser but still significant matters, the most colorful of which was a spanking for the fifth circuit for allegedly giving too little attention to the mandates of the labor laws.

It might not have appeared so clearly as a spanking but for the dissent. As everyone knows, the National Labor Relations Act and the Fair Labor Standards Act look a little less demanding to the fifth circuit, covering Florida, Georgia, Alabama, Mississippi, Louisiana and Texas, than they do to most of the rest of the courts of the country. Ten years ago, the Labor Board brought to the Court a petition for certiorari from the fifth circuit alleging that that court had consistently failed "to give effect to the provisions of the Act that the findings of the Board as to facts, if supported by evidence, shall be conclusive." The Supreme Court reversed the fifth circuit in a manner which made clear its desire for that circuit to fall into line.<sup>16</sup>

But it takes more than one admonition to convince the fifth circuit's able, colorful, tenacious Judge Hutcheson, and this year the Board filed five more petitions for certiorari telling the ten year old story over again. The Court granted two of them and reversed, in opinions tactfully assigned to Justice Clark, most recent appointee from that circuit.<sup>17</sup> The

<sup>15</sup> For full discussion and citations on matters summarized in this paragraph, see the discussion on civil rights, p. 20 *infra*.

<sup>16</sup> *NLRB v. Waterman Steamship Co.*, 309 U.S. 206 (1940).

<sup>17</sup> *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563 (1950), and a companion case, *NLRB v. Pool Mfg. Co.*, 339 U.S. 577 (1950). The three denied were *NLRB v. Atlanta Metallic Casket Co.*, *NLRB v. Massey Gin & Machine Works, Inc.*, and *NLRB v. Wilson & Co.*, 338 U.S. 910 (1950).

subject matter of the cases is too routine to be worth statement, and the certioraris would not have been worth granting if nothing but the immediate cases were involved.

Justice Clark made no reference to the "special problem" of the fifth circuit, treating the cases on the merits. But Justice Frankfurter, dissenting, maximized the circuit's rebuke by protesting it:

Since the record permits, we ought to attribute to a Court of Appeals not a willful disregard of principle, and, as such, an abuse of discretion, but an honest desire to get light on happenings after the Board's orders relevant to its duties as a court of equity. Courts of Appeals are human institutions. By attributing to the Court of Appeals an abusive exercise of discretion when the record may fairly be otherwise interpreted, we . . . needlessly rebuke that court. . . .<sup>18</sup>

Another matter with which the Court had dealt before, and on which it was now time to become peremptory, was the matter of discrimination by the Brotherhood of Locomotive Firemen against Negro firemen. The Court had previously made it so clear that the Brotherhood could not, under the Railway Labor Act, enter into agreements under which Negroes were permanently assigned to the poorest jobs<sup>19</sup> that, as the Court put it, this year's case presented "a continuing and willful disregard of rights which this Court in unmistakable terms has said must be accorded Negro firemen." The Brotherhood hoped it had some procedural wrinkles as defenses against an injunction suit, particularly a defense under the Norris-LaGuardia Act. This the Court thrust aside in a word, saying, "If, in spite of the *Virginia, Steele* and *Tunstall* cases, there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce those rights, we dispel it now."<sup>20</sup>

Far more important was the clarification of ambiguities arising from a decision the term before, *International Union, UAW v. WERB*,<sup>21</sup> involving the power of states to limit the right to strike. The Wagner and Taft-Hartley Acts recognize the employee's right "to engage in concerted activities for the purpose of collective bargaining." May states put limits of their own on those concerted activities?

In the *UAW* case of the preceding term, the Court had upheld a Wisconsin prohibition of a strike method which the majority found similar to the sit-down strike. The union there had argued that Congress had filled

<sup>18</sup> *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 576 (1950).

<sup>19</sup> *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen & Engineers*, 323 U.S. 210 (1944).

<sup>20</sup> *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949).

<sup>21</sup> 336 U.S. 245 (1949).

this legislative field, and that the states could not devise new limits of their own. It was unclear from the earlier opinion whether the Court had upheld Wisconsin (a) because this kind of strike was not, due to its peculiar nature, within the federal protection of "concerted activities" at all; or (b) because the state was empowered to put such limitations as it liked on the right to strike despite the Wagner and Taft-Hartley Acts.

As the situation was summarized in the article at the close of the last term: "The point is vital. If labor activities are outside the scope of major constitutional protections, and if such labor activities are now also removed from the protective covering of the Taft-Hartley Act, then states may do as they will with labor's 'concerted activities.' The showdown may come upon review of recent state laws forbidding strikes in public utilities, which, like any other strikes, are also 'concerted activities for the purpose of collective bargaining.' New Jersey and Wisconsin courts have recently held that under the instant decision the states are free to take public utility strikes out of the protection of [the Acts] by declaring such activities 'illegal.' Even more significantly, the Supreme Court of Michigan has interpreted the *UAW* decision to uphold the requirements of Michigan law that strikes be approved by a majority vote of all employees in a bargaining unit. But it is extremely doubtful that the *UAW* decision, although ambiguous, meant the Taft-Hartley Act protection to be dependent to this extent upon state predilections."<sup>22</sup>

This year the Michigan case just referred to came to the Supreme Court, which made very clear that it had upheld Wisconsin the year before only because the conduct there involved, due to its sit-down quality, fell "outside the protection of the federal act." Otherwise, said the Court, "None of these sections [of the federal acts] can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."<sup>23</sup>

Words could scarcely be clearer. They say that, where interstate commerce is involved, states cannot put limitations on "peaceful strikes for higher wages." Nonpeaceful strikes, or strikes for other purposes, remain to be argued about.

Fourteen years ago in *Senn. v. Tile-Layers Protective Union*, Justice Brandeis said, "Members of the union might, without special statutory authorization by a state, make known the facts of a labor dispute, for

<sup>22</sup> 1948 Term article, 8-9.

<sup>23</sup> *Int. Union, UAW, CIO v. O'Brien*, 339 U.S. 454 (1950).

freedom of speech is guaranteed by the Federal Constitution.”<sup>24</sup> Exactly what that passage meant in its context in 1937 is arguable, but for a time it did not seem to matter. In *Thornhill v. Alabama*,<sup>25</sup> three years later, the Court refused to permit a state to enjoin all peaceful picketing in a conventional labor dispute on the theory that picketing was a form of speech protected by the principles of freedom. A few years later, the Court restated the *Senn* dictum as a categorical proposition, ignoring all questions of a special meaning that it might have had in its context.<sup>26</sup> The dictum thus passed from an aside to a flat statement of the right, as a constitutional matter, to “make known the facts of a labor dispute.”

The principle of law which thus evolved was as important as picketing itself, because it was widely, though perhaps carelessly, understood to insulate peaceful picketing from state control.<sup>27</sup> The *Thornhill* case has been invoked hundreds of times in strikes.

That the Supreme Court had never meant to push the immunity of picketing as far as some had thought became apparent a year ago in the case of *Giboney v. Empire Storage & Ice Co.*<sup>28</sup> There the union sought to compel an employer to commit certain practices which were in violation of the state anti-trust laws. The Court held that the picketing, though peaceful, had no protection under the Fourteenth Amendment when it was directed toward an illegal purpose. The *Giboney* case thus opened wide the possibility that the ruling of *Thornhill* could be largely undercut if labor objectives were, with due ceremony of law, made illegal.

Two cases this year so widened the entries to this zone of illegality as to leave very little of *Thornhill*. In *Building Service Employees v. Gazzam*,<sup>29</sup> all the employees of a particular employer had, in a free and fair election, voted not to join a building service union. The union thereupon began picketing the employer to induce him to force his employees into the union. A Washington state court enjoined the picketing.

The Supreme Court, in an opinion by Justice Minton, applied the principle of the *Giboney* case, and referred to two categories of labor conduct: first, acts which are “an abuse of the right to picket,” and, second, “acts

<sup>24</sup> 301 U.S. 468, 478 (1937).

<sup>25</sup> 310 U.S. 88 (1940).

<sup>26</sup> *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295 (1943).

<sup>27</sup> For brief reference to the leading cases, consult 1948 Term article, 5 et seq.

<sup>28</sup> 336 U.S. 490 (1949), noted in 16 Univ. Chi. L. Rev. 701 (1949).

<sup>29</sup> 339 U.S. 532 (1950).

which are a means of peaceful and truthful publicity.”<sup>30</sup> The measure of difference was whether the conduct desired of the employer was consonant with “the public policy of the state.” In *Giboney* the employer could not comply with the request without violating provisions of the state criminal law. In *Gazzam*, no criminal provision was involved, but the employer could not force his employees into the union without violating the general principle of state legislation that employees should have uncoerced free choice in their selection of bargaining representatives. The absence of criminal sanctions was immaterial since they are only one evidence of “public policy,” and other evidence would do as well.

What *Giboney* and *Gazzam* had in common was that the public policy which the employer would violate if he yielded to the pickets was to be found in explicit legislation of the state. The case of *International Brotherhood of Teamsters v. Hanke*<sup>31</sup> took a far longer step away from *Thornhill* because no legislation was involved.<sup>32</sup> In *Hanke*, another Washington case, the teamsters had picketed peacefully to compel a seller of used cars and his employees, all members of his family, to join the union. The ultimate purpose had been to win compliance with a union rule against week-end and evening work, since if the small independents were open at those hours it was difficult for the union to maintain its standards elsewhere. The Washington court enjoined the picketing.

This time the “public policy” was made by the supreme court of Washington, with no legislative support. That court, in this case, said that the union’s interest “is far outweighed by the interests of individual proprietors and the people of the community as a whole, that individual and little business men and property owners shall be free from dictation as to business policy. . . .”<sup>33</sup>

In upholding the injunction Justice Frankfurter, for the three Justices who agreed with him, cut the earlier picketing decisions to their barest bones. The *Senn* case was pushed back to its facts and the passage quoted above was treated as dictum not to be read in the light of subsequent interpretations put upon it. Three subsequent cases were reduced to their facts with an observation that it is “the Court’s duty to restrain general expression in opinions in earlier cases to their specific context.”<sup>34</sup>

<sup>30</sup> *Ibid.*

<sup>31</sup> 339 U.S. 470 (1950).

<sup>32</sup> See also *Hughes v. Superior Court*, 339 U.S. 460 (1950), in which the same majority as in the *Hanke* case upheld a California injunction against picketing, the Justices who dissented in *Hanke* concurring separately.

<sup>33</sup> *Ibid.*, at 477.

<sup>34</sup> *Ibid.*, at 480 n. 6.



What, then, is the ruling which emerges? Justice Frankfurter here transfers to the picketing field his entire theory of due process of law, that all state restraints are valid which have any rational support.<sup>35</sup> He states his decision in stating his conclusion: "[W]e cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice."<sup>36</sup> Justices Minton, Reed and Black dissented.

The majority opinion leaves little effect for the *Thornhill* case. Labor disputes are in their nature so volatile that they must be subjected to very clear rules. Were the rule that peaceful picketing must be permitted when it does not require an employer to violate a clearly stated statute, labor could understand and the police could enforce it. When, however, the pickets and the police are supposed to guess whether or not the conduct desired by the pickets of the employer is (a) compatible with a not-yet announced state policy which (b) "is consistent with rooted tradition of a free people," the "rule" can satisfy only those who appraise law at the level of verbalisms on the books rather than in terms of its practical consequences in human affairs.

All this makes a difference only if picketing makes a difference. Perhaps it does not. Picketing is vanishing from all the basic industries except for token purposes, because where a union is substantially the whole of the labor force, it is easier and just as effective to strike by staying home rather than by carrying signs. Picketing today is very nearly a phenomenon of the direct consumer-contact trades—the bakers, the laundrers, the milk distributors, the restaurants, or, in this case, the used car dealers.<sup>37</sup> Data as to the quantity of picketing currently being carried on are not available. While it is small, relative to the total volume of organized labor, it is not insubstantial. To the extent that picketing is practiced, this decision, turning the prerogative of enjoining picketing back to the state courts for substantially any reason of labor policy which may appeal to them, is an important development in labor relations.

This case is but another signpost on a judicial road toward governmental control of labor relations: three years ago, the *Lewis* case;<sup>38</sup> last year, the validation of anti-closed shop restriction and the first peaceful

<sup>35</sup> See the concurring opinions of the Justice in *Malinski v. New York*, 304 U.S. 401 (1945), and *Adamson v. California*, 332 U.S. 46 (1947).

<sup>36</sup> 339 U.S. 477, 478 (1950).

<sup>37</sup> Those are the trades involved in several of the series of Supreme Court cases.

<sup>38</sup> *United Mine Workers v. United States*, 330 U.S. 258 (1947).

picketing limitations;<sup>39</sup> this year the *Gazzam* and *Hanke* cases and a refusal by a majority even to hear the complaint against the fabulous fine put on the United Mine Workers.<sup>40</sup> If organized labor ever was the favorite of the judiciary, it is so no longer.<sup>41</sup>

#### MONOPOLY AND FREE ENTERPRISE

There were no broadly significant trade regulation cases this year. The only exception may be *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*<sup>42</sup> Hazeltine is a radio patent-holding corporation, which licenses its hundreds of patents en bloc, but which requires the licensee to pay royalties on all sales of radio parts regardless of the extent to which it actually uses the Hazeltine patents. Hazeltine had licensed to this defendant 570 patents and 200 applications, of which defendant actually used ten. In a royalty suit, the licensee contended (a) that the entire agreement was void because of the system of charging royalties on sales of non-patented articles; and (b) regardless of the first point, that the patents were invalid. The licensor replied that the payment system did not void the licensing agreement, and that a patent licensee was estopped from challenging the validity of patents. Justice Minton for the majority upheld the licensor on both points.

Petitioner contended that the payments arrangement violated the principle of the "tie-in" cases. Those cases had held illegal requirements of the purchase of unpatented goods as a condition of obtaining a patent license; they forbade the requirement that the licensee refrain from competition with the licensor; and they held illegal the granting of one patent license conditioned upon acceptance of another.<sup>43</sup> The *Hazeltine* case was obviously none of those cases. The licensor did not compel the licensee to purchase unpatented goods, or to refrain from competition, or to use

<sup>39</sup> *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (closed shop); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (picketing).

<sup>40</sup> *Int. Union, United Mine Workers v. United States*, 177 F. 2d 29 (1949), cert. den. 338 U.S. 871 (1949), Black, Reed, and Douglas, JJ., dissenting.

<sup>41</sup> Other important labor cases of the year were: (a) *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355 (1949), rejecting the so-called "Rutland Court" doctrine of the Board and holding that the Board could not, in effect, set aside a closed shop agreement of such long duration that it patently no longer reflected the wishes of the actual employees. For extended discussion, consult Koretz, *Rejection of the Rutland Court Doctrine*, 1 *Syracuse L. Rev.* 425 (1950); (b) *Powell v. U.S. Cartridge Co.*, 339 U.S. 497 (1950), holding the Fair Labor Standards Act applicable to private operators of government owned munitions plants operated under cost-plus contracts.

<sup>42</sup> 339 U.S. 827 (1950).

<sup>43</sup> The cases are collected in notes 1, 2, and 3 to the opinion of the Court. *Ibid.*, at 830-31.

licenses he would otherwise not want. On the other hand, what the licensor did require is very similar to the previous tie-ins. Since the licensee must pay a royalty based on total sales regardless of whether he used the licensor's patents, there is a strong incentive to the licensee not to use someone else's patents, for which he would in effect be paying a second time.

Since the law would have to expand somewhat beyond any existing precedent to render illegal this type of license agreement, the case becomes something of a sample of how the new Court decides when the law will expand. The majority opinion of Justice Minton begins by finding that the conduct complained of is not squarely within any existing case. It proceeds, "This royalty provision does not create another monopoly; it creates no restraint of competition upon the legitimate grant of the patent."<sup>44</sup> Since the latter half-sentence covers the only point in issue, it in effect combines the ruling and the reasoning of the case.

On the issue of whether a licensee should be able to attack the validity of a patent, there has for a long time been an earnest, if minority, view that licensees should be allowed to challenge the validity and that any case to the contrary should be overruled. As Justice Douglas said in dissent in this case, "No other person than the licensee will be interested enough to challenge them. He alone will be apt to see and understand the basis of their illegality."<sup>45</sup> To this Justice Minton responded, "The general rule is that the licensee under a patent license agreement may not challenge the validity of the licensed patent in a suit for royalties due under the contract. *United States v. Harvey Steel Co.*, 196 U. S. 310."<sup>46</sup>

This and the other patent cases of the year are only straws in the wind,<sup>47</sup> but they suggest the tentative hypothesis that the new Court will stick much closer to the strict boundaries of the precedents in the law of trade regulation than did its predecessor.<sup>48</sup> Each of the precedents which the Court distinguished in respect to tie-ins had themselves created new law

<sup>44</sup> *Ibid.*, at 833.

<sup>45</sup> *Ibid.*, at 840.

<sup>46</sup> *Ibid.*, at 836.

<sup>47</sup> *Faulkner v. Gibbs* was discussed in the text at note 2 *supra*. Consult also *Graver Tank & Mfg. Co. v. Linde Air Products*, 339 U.S. 605 (1950), giving a most liberal interpretation to the "doctrine of equivalents." This year's cases have created a vivid impression, apparent from informal observations collected among lower courts, that the Supreme Court has now abandoned the "tough" patent anti-trust policy of Stone, Black, and Douglas, and has moved toward the "soft" policy of Frankfurter and Jackson. In recent years the Court has barely and ineffectively held in check the unlimited enthusiasm of the Patent Office for giving a patent on almost anything. For discussion, consult 1948 Term article, 19-24.

<sup>48</sup> Note the manner in which, in the instant case, the Court stops at the exact edges of the precedents.

when they were decided. The new Court apparently wishes that process of development to stop.

#### OTHER PROBLEMS OF BUSINESS

As usual, there was a miscellaneous variety of business problems, largely routine. The principal bankruptcy case was *Manufacturers Trust Co. v. Becker*,<sup>49</sup> involving an application of the "Deep Rock" doctrine. The issue, put generally, is the degree of scrutiny the courts will exercise over transactions between directors and their corporations on the basis of which the directors make claims in bankruptcy. In the *Deep Rock* case, *Taylor v. Standard Gas Co.*,<sup>50</sup> the Court had held that the bankruptcy court should exercise equitable powers to subordinate the claims as creditor of a dominant shareholder who had mismanaged and underfinanced the corporation. The underlying principle was expanded in *Pepper v. Litton* in an apparently careful and deliberate dictum:

A director is a fiduciary. . . . So is a dominant or controlling stockholder . . . their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness. . . .<sup>51</sup>

In the *Becker* case, the corporation became insolvent in 1942. During the three years following, relatives and associates of one of the directors purchased sixty per cent of an outstanding bond issue at from three to fourteen per cent of face value. In 1946, the corporation filed a petition under Chapter XI of the Bankruptcy Act, and under the ultimate arrangement, these bonds were to be paid off at forty per cent of face value. Other claimants contended that the director's associates should be paid off only to the extent of their actual investment.

The majority opinion, by Justice Clark, quietly appears to abandon the *Pepper* rule.<sup>52</sup> The Court did not require the director's associates to meet any burden of proof, but rather "intuited" that "on this record the probability that an actual conflict of loyalties arose from the opportunity to purchase . . . is not great enough to justify the exercise of equity

<sup>49</sup> 338 U.S. 304 (1949), noted in 17 Univ. Chi. L. Rev. 675 (1950).

<sup>50</sup> 306 U.S. 307 (1939).

<sup>51</sup> 308 U.S. 295, 306 (1939).

<sup>52</sup> The principle had previously been struck a glancing blow in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), holding that neither *Pepper* nor any other "principles of equity announced by courts" (at 87) would support an SEC ruling that directors and related interests which had purchased preferred stock pending reorganization under the Public Utility Holding Company Act were limited to their purchase price; but cf. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

jurisdiction.”<sup>53</sup> No “burden” whatsoever was placed on the director. Since in these matters, only the insiders are likely to have enough information to carry a burden of proof, the placing of the burden is a vital factor in the disposition of cases of alleged improprieties prior to bankruptcy. Under *Pepper*, there was some chance of catching up with the slick wrongdoer as well as the obvious wrongdoer; the *Becker* case returns to putting a premium on the wrongdoer’s adroitness.

Members of the law teaching profession will be particularly interested to note that Professor Walton Hamilton, recently “retired” to active practice after many years of commenting on the Supreme Court, this year argued his first case in that tribunal. As has been the case before with Professor Hamilton, his cause was stronger than his precedents. In the *Secretary of Agric. v. Central Roig Refining Co.*<sup>54</sup> the ultimate issue was the validity of an order of the Secretary sharply limiting the refining of sugar in Puerto Rico. The order, Puerto Rico contended, was engrafted on to the general national sugar quota system. That territory is permitted to grow sugar, but it is not permitted to refine nearly as much as it produces. Desperate for manufacturing enterprise to relieve its terrible economic circumstances, the territory is anxious to increase the volume of its refining. Alleging that the federal government could not permanently keep Puerto Rico in a depressed state by forbidding it to engage in its most obvious manufacture, Professor Hamilton and others for Puerto Rico challenged either the government’s order or the act on which it was based. Unfortunately from the Puerto Rican point of view, the Court could find nothing in the Constitution except the due process clause which might restrict the power of Congress in this respect and the majority opinion of Justice Frankfurter held that the sugar licensing system of which the Puerto Rican restrictions are a part was not so “arbitrary, discriminatory, or unfair” as to violate that clause of the Constitution.<sup>55</sup>

Of the remaining matters of concern to the business community, the year’s developments in respect to eminent domain and to tideland oil stand out.

<sup>53</sup> 338 U.S. 304, 313 (1950).

<sup>54</sup> 338 U.S. 604 (1950).

<sup>55</sup> Justice Black dissented on other grounds. Episode in oral argument: Mr. Hamilton had stepped slightly to the left of counsel’s lectern, and the Chief Justice, fearing that Justices at the right end of the Bench might not be able to hear clearly, said, “Mr. Hamilton, would you mind stepping to the right?” Mr. Hamilton, complying, replied, “Certainly not, may it please your honor, I’m quite in the habit of being asked to step to the right.”

a) *Eminent domain.*

Aside from due process, few matters are as completely thrown into the lap of the judiciary by our constitution as is the law of eminent domain. The few words in the Fifth Amendment which provide that private property shall not be taken for public use "without just compensation" have been the foundation of a tremendous legal structure. That structure was extended this year.

Determination of the standard of payment for articles condemned in war time presented serious problems. Two years ago, the Court saw the question of whether the ceiling price should be the standard of value in war time and skittered away from it.<sup>56</sup> This year, in *United States v. Commodity Trading Corp.*, the question recurred.<sup>57</sup> The company during the war owned a very large share of the American supply of pepper and declined to sell to the government at the ceiling price. The government condemned.

Opposition to making the ceiling the "value" lies primarily in the fact that the ceiling price is set with no necessary regard to the highly particularized factors which would go into an eminent domain value judgment. On the other hand, if large suppliers could force the government to condemn for more than the ceiling price, in large areas there might be nothing left of the ceilings.<sup>58</sup>

The Company contended, and the Court of Claims held, that one of the elements of value for eminent domain purposes should be "retention value" or the value which represented the right to hold the goods, if need be, until after the war. The argument was supported by the contention that the Price Control Act had not meant to compel sales by unwilling vendors.

The Court divided on other points but there was unanimity in the result of Justice Black's disposal of this contention. "Retention value," he said, assumes something which does not exist, namely the right to retain as against the government. The power of eminent domain, one

<sup>56</sup> *United States v. Felin & Co.*, 334 U.S. 624 (1948), summarized briefly, 1947 Term article, 13 n. 49.

<sup>57</sup> 339 U.S. 121 (1950). In the third footnote to the opinion, the Court noted in passing that Congress has power, if it wishes, to determine rates of "just compensation" and that an Act so doing would have to be reviewed on the same—and no stricter—basis as any other statute alleged to violate the Constitution. The note thus rejected dicta denying Congress any power in the premises in *Monongahela Navig. Co. v. United States*, 148 U.S. 312, 327 (1893).

<sup>58</sup> For discussion of some of the problems presented in the context of one industry, see Nathanson and Hyman, *Judicial Review of Price Control: The Battle of the Meat Regulations*, 42 Ill. L. Rev. 584 (1947).

which government is not capable of relinquishing, is one as against which there can be no right to retain. As for the choice of the measure of value, Justice Black said, "We think the congressional purpose and the necessities of a war time economy require that ceiling prices can be accepted as the measure of just compensation, so far as that can be done consistently with the objectives of the Fifth Amendment."<sup>59</sup> If the imposition of ceiling prices would, because of some peculiar circumstances, be unfair to a particular person, that person must sustain "the burden of proving special conditions and hardships peculiarly applicable to it."<sup>60</sup>

In two other eminent domain cases the Court was again confronted with the perpetually perplexing problem of the determination of the standard of value to be applied to property damages caused by the alteration of river levels as a result of federal flood control, irrigation, or power developments. As was argued in this article a year ago, this can be an extremely important question for the future development of public power, and may be of crucial significance in the development of the Missouri Valley.<sup>61</sup>

Ultimate questions turn on difficult legal theories involving the rights of riparian owners in flowing waters. A few observations have a safe basis:

1. Under the rule of *United States v. Chandler-Dunbar Water Co.*,<sup>62</sup> no person can acquire, except by direct grant from the government, a property interest in the flow of a navigable stream. If improvements have been made in a navigable stream without government license, they may be destroyed without cost to the government, and if land is taken along a navigable stream for a power project, it is to be valued on bases apart from any claimed right to use the water. In short it cannot be appraised at the so-called "power value" which could well be the highest value it might have.

2. These principles were once held not inapplicable to nonnavigable streams. In *United States v. Cress*,<sup>63</sup> it was assumed that the running water of nonnavigable streams could be privately owned. In that case the level of a nonnavigable stream was raised, destroying the value of an installation in that stream, and the government was required to pay for it.

3. On any theory, for any kind of stream, if the government floods over the high water mark of a navigable or a nonnavigable stream, the flooding is regarded as a taking for which the government must make

<sup>59</sup> 339 U.S. 121, 125 (1950).

<sup>60</sup> *Ibid.*, at 128.

<sup>61</sup> For discussion, consult 1948 Term article, 13-18.

<sup>62</sup> 229 U.S. 53 (1913)

<sup>63</sup> 243 U.S. 316 (1917).

compensation at some value.<sup>64</sup> The problem of determining that value can conceivably be caught up in the issues suggested by the two preceding observations, but some compensation there must be.

Twice before the government has asked the Court to overrule the *Cress* case and to eliminate the concept of a special property in nonnavigable streams.<sup>65</sup> This year the new Court gave the *Cress* rule its first new vitality in many years. Two cases raised the problem. In one, *United States v. Gerlach Livestock Co.*,<sup>66</sup> the issue was whether the government must make compensation for loss of irrigation water by persons along nonnavigable streams in the Central Valley Project of California, when the government diverted the streams. The Court, in an interestingly written opinion by Justice Jackson, cleared the mist which had long hovered over the source of the government's power to undertake multiple purpose navigation, flood control, irrigation, and power projects. For years it had been the custom to append those projects to a highly fictional navigation power deduced from the commerce clause. Justice Jackson found that the power to "provide for the . . . general welfare" gave power sufficient to cover "large scale projects for reclamation, irrigation or other control improvement."<sup>67</sup> He then escaped the serious constitutional question of the nature of the water rights of riparian owners by a happy finding that as a matter of statutory interpretation of the reclamation laws, Congress intended that these claims be compensated regardless of any constitutional prerogative it might have had not to do so.

The second case, on a related subject, *United States v. Kansas City Life Ins. Co.*, permitted no such easy statutory escape.<sup>68</sup> The claimant owned land along a nonnavigable creek, the land surface being slightly higher than the creek's ordinary high water mark. Claimant's land drained into the creek, and from there into the Mississippi. Operations by the United States on the Mississippi raised the level of the creek to the high water mark, thus cutting off the claimant's subsoil drainage. The land was thus "underflowed."

Justice Burton for four Justices, Justice Clark concurring in the result,

<sup>64</sup> *United States v. Lynah*, 188 U.S. 445 (1903), limited in respects which do not bear on this proposition in *United States v. Chicago, Milwaukee, St. P. & P. R. Co.*, 312 U.S. 592 (1941).

<sup>65</sup> The problem was avoided in *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943), and *United States v. Willow River Co.*, 324 U.S. 499 (1945).

<sup>66</sup> 339 U.S. 725 (1950).

<sup>67</sup> *Ibid.*, at 738. This was most ingeniously drawn out of *United States v. Butler*, 297 U.S. 1 (1936), the decision invalidating the Agricultural Adjustment Act.

<sup>68</sup> 339 U.S. 799 (1950).



invoked the *Cress* case and gave judgment for the claimant. *Cress* was thus reestablished as a precedent, the dissenting four Justices urging in vain that it be overruled. The majority divided its analysis into two questions: first, "Whether the United States, in the exercise of its power to regulate commerce, may raise a navigable stream to its ordinary high water mark and maintain it continuously at that level in the interest of navigation, without liability for the effects of that change upon private property beyond the bed of the stream"; and second, "Whether the resulting destruction of the agricultural value of the land affected, without actually overflowing it, is a taking of private property within the meaning of the Fifth Amendment. . . ."<sup>69</sup>

The questions are quoted here because, for this reader at least, the opinion eludes full comprehension, and I hesitate to summarize it for fear of doing it injustice. The majority's treatment of the second question seems to eliminate the point of asking the first. The Court accepted as a fact, under the second question, that the claimant's land had been "invaded by the percolation of the water" and concluded that "whether the prevention of the use of the land for agricultural purposes was due to its invasion by water from above or from below, it was equally effective." The principal cases cited are those mentioned above holding that flooding requires compensation.<sup>70</sup> In short, in this branch of the opinion, the Court holds that underflow is one type of flooding and then applies the conventional rule for compensation in the circumstances.

But those cases are equally applicable to navigable and to nonnavigable streams. It would therefore seem completely unnecessary to consider whether the government's power was different over the one type of stream than over the other, unless something is made to hang on it. An issue of value, as whether "power value" or "farm value," might depend on a determination of the *Cress* question, but here value was stipulated.

The net effect is that the *Cress* rule appears to be restored and that the government is to be held liable on a theory of property rights for such alterations in stream flow as it may make, *e.g.*, in the hundreds of non-navigable streams in the Missouri Valley.<sup>71</sup> Since the dissent by Justice Douglas, joined by Black, Reed, and Minton, did not regard the raising of the stream level to the high water mark as flooding at all, it necessarily reached the question of the *Cress* case: "But until today's ruling the

<sup>69</sup> *Ibid.*, at 800-801.

<sup>70</sup> For example, *United States v. Lynah*, 188 U.S. 445 (1903).

<sup>71</sup> The possible consequences in the Missouri Valley are considered in some detail in the 1948 Term article, 13-18.

*Cress* case had been largely destroyed by intervening decisions. I would complete the process. . . ."<sup>72</sup>

b) *Tidelands*.

Three years ago the Supreme Court held that the United States rather than California owned the minerals in the lands under the waters off the coast of that state.<sup>73</sup> This year the issue was whether the same result should be reached as to the lands off Louisiana and Texas.

The Louisiana case presented no serious issue which had not been decided in the California case and the Court unanimously gave judgment for the United States.<sup>74</sup> But Texas raised different questions. Texas had come into the United States after some years of existence as an independent republic. In return for Texas' retention of its substantial debts the United States had conceded to it "all the vacant and unappropriated lands lying within its limits. . . ."<sup>75</sup> Hence, argued Texas, the reservation in the treaty of annexation gave it special rights to the under-ocean lands.

The precise issue before the court in the Texas case was whether it should be referred to a special master to take scientific and historical evidence on the possible meaning of the language of reservation. The Court held that this was not required and gave judgment for the United States.

Texas, like other states, entered the United States on an "equal footing" with all other states. This was expressly stipulated in the joint resolution admitting Texas to the Union.<sup>76</sup> That concept has hitherto been used to *increase* the prerogatives of states by holdings that their sovereign political rights, including the ownership of river beds, is as great as that of earlier states.<sup>77</sup> In the Texas case, the government contended that the "equal footing" clause might be a limitation on a state: "In our view, the present pertinence of the clause is that it not only gives a new State such additional governmental rights, powers, and privileges, as may be re-

<sup>72</sup> 339 U.S. 799, 813-14 (1950).

<sup>73</sup> *United States v. California*, 332 U.S. 19 (1947).

<sup>74</sup> *United States v. Louisiana*, 339 U.S. 699 (1950). The Louisiana case had some newspaper notoriety when the State took the unusual step of asking for a jury in this Supreme Court proceeding, a plea quickly rejected on the ground that this was an equity proceeding.

<sup>75</sup> 5 Stat. 797, 798 (1845).

<sup>76</sup> *Ibid.*, at 797. A petition for rehearing filed by Texas contends that the joint resolution offered two alternative methods of admission, and that the "equal footing" clause was not contained in the alternative in fact used. As the following discussion shows, if this point is factually well-taken, the opinion of the Court must be recast; but it may reach the same result on purely constitutional grounds, without reference to the joint resolution. *Coyle v. Oklahoma*, 221 U.S. 559, 566 (1911).

<sup>77</sup> *Brown v. Grant*, 116 U.S. 207, 212 (1886); *Pollard's Lessee v. Hagan*, 3 How. (U.S.) 212 (1845); *Case v. Toftus*, 39 Fed. 730 (C.C. Ore., 1889).

quired to raise it to the level of the previously admitted States, but, at least in the absence of express preservation of a superior status, it also cuts down any special privileges, powers, or rights—over and above those possessed by the other States—which a new State may have possessed prior to admission because of a unique position, such as Texas' national independence."<sup>78</sup>

The Court, in an opinion by Justice Douglas (Reed, Minton, and Frankfurter dissenting), adopted this view.<sup>79</sup> It conceded that Texas may have owned the lands when it came into the Union, but that since, under the *California* case, no other state could own the subjacent lands, Texas, to be on an "equal footing," must have given up whatever rights it had.

The case was decided on motion for summary judgment. Texas, urging that the case be referred to a special master, emphasized that the case "involves the largest area of land ever the subject of litigation before an American Court."<sup>80</sup> The Court held the "equal footing" clause so clear that there was nothing for a master to consider.

The Court appears to concede that, were it not for the "equal footing" clause, Texas would prevail under the "vacant and unappropriated land" clause. In other words, these two clauses are in conflict, and one must be read as a modification of the other. Except for a passing, two-word dictum, nothing in the precedents suggests that the "equal footing" clause must necessarily override the "vacant and unappropriated land" clause, instead of being subordinate to it.<sup>81</sup> Reference to a master might have permitted fuller exploration of what Congress actually contemplated by the two provisions; but a reading of the briefs of the parties—and Texas filed a scholarly 240 page brief with a 105 page appendix—leaves great doubt that any amount of further evidence would add any substantial "meaning" to the words in issue. Texas argued that "Letters, speeches, and other documents will show conclusively that no one at the time made any contention that these lands would *not* belong to the new State,"<sup>82</sup> but this in reality only further supports the most likely solution, that the Congress of the 1840's never thought about this problem one way or another.

<sup>78</sup> United States v. Texas, 339 U.S. 707 (1950), brief for United States at 61-62.

<sup>79</sup> United States v. Texas, 339 U.S. 707 (1950). The opinion of Justice Frankfurter is ambiguous, but it seems to be more a dissent than a concurring opinion and is so treated in this article.

<sup>80</sup> United States v. Texas, 339 U.S. 707 (1950), brief for Texas at 226.

<sup>81</sup> In *Coyle v. Oklahoma*, 221 U.S. 559, 566 (1911), the Court said that under the principle of equality, one state is not "less or greater" than another.

<sup>82</sup> United States v. Texas, 339 U.S. 707 (1950), brief for Texas at 25, 26.

## III. CIVIL RIGHTS

American civil liberties history, like American economic history, is cyclical. Every twenty to thirty years we experience an economic Depression. Every twenty to thirty years we also experience a civil-liberties Repression. These cycles do not normally coincide—rather, our Repressions follow about twenty years after our Depressions.

This Repression cycle began with the alien and sedition scare at the beginning of the 19th century and continued to the anti-Masonic movement about 1830, the climax of nativism in the 1850's, the anti-anarchist frenzy of the 1880's and 1890's, and the Great Red Scare of 1918 to 1927. As the cold war progressed during 1949-50, the intensity of the current American Repression mounted. While a frenzy of fear was systematically whipped up, the task of the judicial historian became progressively more one of recording the evidence to show whether the judiciary was standing out against or bowing to the tide.

In these recurring Repressions, neither the Bill of Rights nor the judiciary has ever proved of much immediate significance. Jefferson did not think they would. In a remarkably penetrating analysis after the Alien and Sedition Acts, he said:

It is still certain that tho' written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people: they fix too for the people principles for their political creed.<sup>83</sup>

These pendulum swings until recently rarely came before the judiciary, but, on the basis of limited experience, an hypothesis may be advanced that courts love liberty most when it is under pressure least; for the Constitution usually yields, as Jefferson thought it would, to repressionist drives.<sup>84</sup>

The Repression decisions of the 1920's, then so vainly protested by

<sup>83</sup> Jefferson to Dr. Priestly, June 19, 1802, V Documentary Hist. Const. 259-60 (1905).

<sup>84</sup> "Among liberals, the claim of the Supreme Court to respect as a guardian of civil liberties and the Bill of Rights has been taken with varying degrees of seriousness. In the last War, American public opinion displayed an intolerance not out of keeping with the national character. [The reference is to World War I.] It had its comic side, as when sauerkraut was renamed (unavailingly) 'liberty cabbage,' and a more serious side in the legal and illegal repression of dissent. For offenses which in the case of Mr. Ramsay MacDonald led to no more serious penalty than boycott at a golf-club, Mr. Eugene Debs, the leader of the Socialist party, was sentenced to a long term of imprisonment, and the administration of the Espionage Acts was (by the standards of those times) very rigorous. Even imperial Germany treated its political dissenters less severely than did the great Republic. The Supreme Court did not attempt to limit the legislative excesses of Congress—which might have been less extravagant had the members of Congress been less tempted to the heresy that whatever was Constitutional was also right." Brogan, *Politics and Law in the United States* 91-92 (1941).

Holmes and Brandeis, stopped as a result of personnel change.<sup>85</sup> The appointments of Chief Justice Hughes and Justice Roberts in the places of Chief Justice Taft and Justice Sanford resulted in the five-to-four decisions reversing the earlier trend.<sup>86</sup> The dying down of the national nervousness in the late twenties eased this development.

Personnel changes in the late forties now reopen the question of whether we are about to abandon the course begun by the coalescence of Hughes and Roberts with Holmes, Brandeis, and Stone. It may well be that we are about to return to the doctrines of the twenties. Prior to 1949, a breakdown of the Court in terms of enthusiasm for the exertion of judicial power to maintain civil rights put Justices Murphy and Rutledge at the left end of the line, with Justices Black and Douglas near them; Justice Frankfurter far removed toward the center, and Justices Jackson, Reed, Burton and Chief Justice Vinson on the far right.<sup>87</sup> With this year's replacements, the whole line moved so far to the right that the difference between Justice Black at the near left and Justice Frankfurter at the center was almost eliminated.<sup>88</sup> With a frequency amazing only until the certioraris denied are examined,<sup>89</sup> they were in dissenting agreement.

A group of cases involving aliens suggest the temper of the times.

In the by now famous case of *Ellen Knauff*, the final appeal turned out to be not to the Supreme Court but to the *St. Louis Post-Dispatch*. Mrs. Knauff was a war bride, a German who had emigrated to other parts of Europe during the Hitler period and who in 1948, having returned to Germany, married an American soldier. When she sought to enter this country, the Immigration Service excluded her without notice or hearing on the ground that her admission would be "prejudicial to the interests of the United States." Since there had never been notice, hearing, charges or findings, no one, with the possible exception of the bureaucrats who entered the order, have any notion to this day as to why it was entered. Nothing on the face of Mrs. Knauff's record suggests anything prejudicial.

In a habeas corpus proceeding, Mrs. Knauff raised the question of whether she must have a hearing before she could be excluded. The Act of

<sup>85</sup> See Chafee, *Free Speech in the United States*, 285-354 (1941), on the decisions of the 1920's. Prof. Chafee analyzes the results of the personnel changes of 1930 at 357 et seq.

<sup>86</sup> *Near v. Minnesota*, 283 U.S. 697 (1931); *Herndon v. Lowry*, 301 U.S. 242 (1937).

<sup>87</sup> Consult the civil liberties analyses of the 1946, 1947, and 1948 Term articles.

<sup>88</sup> Consult Table 1, *infra*.

<sup>89</sup> The new policies concerning the granting of the writ of certiorari are discussed *infra*, and in Appendix A.

June 21, 1941, provides that the President may issue "reasonable rules, regulations and orders" which are to govern the entrance of aliens during a period of national emergency. One of the regulations in the pyramid which grew out of the statute permitted exclusions without hearings. The ultimate legal issue became whether these regulations were "reasonable," particularly in view of the general policy of the War Brides Act, which was intended to make it easier for soldiers to bring home their wives but which retained a caveat that the bride must still be "otherwise admissible under the immigration laws."

The majority opinion by Justice Minton held the regulations reasonable, with Justices Black, Frankfurter and Jackson dissenting and two Justices not participating.<sup>90</sup> Said the majority, Congress may be as arbitrary about aliens as it wishes, and it need not give the courts the power of judicial review; in view of the fact that the alien has only a privilege and not the right of entry, the restrictions were reasonable.

The dissenting opinions by Justices Frankfurter and Jackson spend very little time on the statute and regulations. As Justice Jackson put it, "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized an administrative official to break up the family of an American citizen or force him to keep his wife by becoming an exile."<sup>91</sup>

At this point the *St. Louis Post-Dispatch*, long a militant defender of individual rights, entered the picture. In a series of editorials it demanded that Mrs. Knauff be given a hearing. It placed full-page ads in the Washington papers stating the case, and interested Representative Walter of Pennsylvania in a private bill to admit Mrs. Knauff. Representative Walter carried that bill through the House. A veteran of 18 years in Congress, and a highly respected conservative, even he was unable to get any information from the Immigration Service as to what its charges might be. Mrs. Knauff herself has been kept on Ellis Island on and off for 22 months as of the date of this writing, and the Walter Committee could see her only by subpoenaing her. The bill went to the Senate where, late in the 81st Congress, it appeared to have been blocked by Senate Judiciary Chairman McCarran.<sup>92</sup>

Meanwhile, the *Knauff* case was back in the courts. The Immigration Service, in a frenzy to be rid of Mrs. Knauff before she could undermine

<sup>90</sup> United States ex rel. *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

<sup>91</sup> *Ibid.*, at 551-52.

<sup>92</sup> The bulk of the information in this and the succeeding paragraph is taken from *St. Louis Post-Dispatch* clippings for which I am indebted to Mr. Irving Dilliard of that newspaper.

the nation from her vantage point on Ellis Island, attempted to whisk her out of the country before Congress could act—and thus investigate. A new habeas corpus proceeding interrupted this haste. Twenty minutes before Mrs. Knauff was to be put into an airplane for Europe by the Immigration Service under orders discreetly marked “no publicity,” Justice Jackson issued a new order requiring that the matter should be held in status quo until new proceedings for certiorari were disposed of.<sup>93</sup> No further action can be taken until fall.

The *Knauff* case, though it is only one family's tragedy, deserves such full attention here if it is symbolic of the attitude of the new Court. “The law,” insofar as there is any preponderance, does lean against Mrs. Knauff. On the other hand, every element of human decency in the case supports her. That is to say, Congress did give the executive power—which it possessed and could give—to be extremely arbitrary in this field; and perhaps it gave as much tyrannical and arbitrary power as the Immigration Service chose to take. It is significant that neither dissenting opinion has any real “legal” material to support its position. On the other hand, it is almost unbelievable that if Congress had really thought about it, it would have submitted war brides to this kind of treatment, and a judge would certainly not be false to his oath of office if he let a little humanity temper the *rigor juris* by requiring that Congress make absolutely explicit an intention to commit such an act as this.

Here the new Court was willing to follow the slight preponderance in the weight of the conventional legal materials, without giving any consideration to where the road led. And yet in another alien case, *United States ex rel. Eichenlaub v. Shaughnessy*,<sup>94</sup> the same majority's behavior was the exact opposite. There the issue was whether a statute which permitted deportation of aliens who committed certain offenses should be applicable to a naturalized citizen who was not an alien when he committed the offense, but who later became an alien again by denaturalization. If the strict wording of the statute were followed, the petitioner could not have been deported, since he was not an “alien” when the offense was committed. The majority opinion by Justice Burton, expanded the statute by interpretation to permit the deportation.<sup>95</sup> Thus two aliens

<sup>93</sup> N.Y. Times, p. 1, col. 2 (May 18, 1950). For an earlier stage of the matter, before the Jackson order but subsequent to the Supreme Court opinion, see 181 F. 2d 839 (C.A. 2d, 1950).

<sup>94</sup> 338 U.S. 521 (1950).

<sup>95</sup> The dissent of Justice Frankfurter, joined by Black and Jackson, JJ., reveals the extent to which it was necessary for the majority to manipulate the statute to reach its result. The Frankfurter opinion said in part: “the statute, in terms, refers to aliens ‘who . . . may hereafter be convicted,’ not persons who are citizens when convicted and later transformed into

are deported, one by strict and the other by loose construction.

From this one should not for the moment deduce that the Court is "anti-alien." In *Wong Yang Sung v. McGrath*, it put a crimp into thousands of deportations by requiring that once aliens, unlike Mrs. Knauff, were in the country, they could not be deported without a hearing which met the standards of the Administrative Procedure Act of 1946, and were held "before a tribunal which meets at least currently prevailing standards of impartiality."<sup>96</sup>

The *Sung* and *Knauff* cases underline the importance for legal purposes of whether an alien subject to American power has once come into the country. The *Sung* case was written by Justice Jackson. His opinion in *Johnson v. Eisentrager* illustrates that the alien outside our borders is outside of the protection of our law.<sup>97</sup>

The issue in the *Eisentrager* case was whether aliens, in this case Germans, convicted by an American military commission abroad for "war crimes," could secure limited review of their convictions in an American court. Justice Jackson declared that they could not. Since these petitioners were convicted before an American military commission, it would follow that the Germans whom Justice Jackson himself convicted at Nuremberg before an international tribunal were also beyond judicial review.<sup>98</sup>

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aliens by the process of denaturalization. And this view of the statute is reinforced by the legislative history as well as by considerations relating to the impact of the Court's decision upon various other congressional enactments not now before us.

"The Committee reports and congressional debate make plain that Congress was principally concerned with the status of about 500 persons who had been interned by the President during the First World War as dangerous alien enemies and about 150 aliens who had been convicted under various so-called war statutes. Congress could not have been unaware that naturalized citizens may lose their citizenship; yet nowhere in the legislative history do we find the remotest hint that Congress had also such denaturalized citizens in mind." *Ibid.*, at 534-55. The dissent also pointed out that citizens might be denaturalized for reasons involving no moral blame, and yet be subject to deportation under the prevailing interpretation.

<sup>96</sup> 339 U.S. 33 (1950). Some related problems suggested by the decision are discussed in 38 Calif. L. Rev. 326 (1950).

<sup>97</sup> 339 U.S. 763 (1950).

<sup>98</sup> The most serious incidental aspect of the *Eisentrager* case is whether American civilians abroad are entitled to any kind of judicial review in the United States if they are imprisoned by the Army. If no American court has jurisdiction to consider the petition of a foreigner because he is not before the court, it obviously may be argued that they would have no more jurisdiction in the case of an American. The Solicitor General took the position that Americans abroad were thus completely subject to military power. The majority carefully avoided accepting that position, though as the dissent of Justice Black, joined by Douglas and Burton, JJ., pointed out, it will be logically difficult to avoid that conclusion when the issue is squarely raised in the light of this decision.

The special interest of the dissent is in its willingness to have the judiciary assume the full responsibility of reviewing military convictions abroad. Excerpts from the concluding paragraphs of the dissent are:

"However illegal their sentences might be, they can expect no relief from German courts



The remaining civil rights problems are so diverse that they may conveniently be divided into four groups: (a) criminal procedure; (b) Congressional procedures; (c) free speech, and (d) segregation.

*a) Criminal procedure.*

The most important fact about the five criminal procedure cases, four of which were decided against the defendant, was that in four of the five, the certiorari were granted *last year*,<sup>99</sup> while the fifth was apparently taken for the purpose of overruling the Murphy opinion of two years ago on a matter of searches and seizures.<sup>100</sup>

In other words, the former Court had an interest in criminal procedure, both state and federal, which left an inheritance now disposed of by this Court. Since January 1, 1950, certiorari has been granted in only two cases involving the constitutional aspects of criminal law.<sup>101</sup> It seems safe to predict that this branch of the law will for a time be swept under the rug of certiorari denied.

A decision setting aside a conviction of a Negro because of discrimination in the selection of a grand jury was of interest only because Justice Clark concurred specially to express some doubts about the wisdom of reversing a conviction on that ground, while Justice Jackson dissented essentially on the ground that grand juries are of no great importance anyway.<sup>102</sup> A right to counsel case had as its main interest the fact that Justices Clark and Minton joined a majority in applying the rule that counsel is not constitutionally required where there is no "fundamental unfairness."<sup>103</sup> The minority on this issue, which has contended that poor

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or any other branch of the German Government we permit to function. Only our own courts can inquire into the legality of their imprisonment. Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy. . . ." *Ibid.*, at 797-98.

"Conquest by the United States, unlike conquest by many other nations, does not mean tyranny. . . . Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. . . . I would hold that our courts can exercise [habeas corpus] whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them." *Ibid.*, at 798.

<sup>99</sup> *Cassell v. Texas*, 339 U.S. 282 (1950); *Darr v. Burford*, 339 U.S. 200 (1950); *Quicksall v. Michigan*, 339 U.S. 660 (1950); *Solesbee v. Balkom*, 339 U.S. 9 (1950).

<sup>100</sup> *United States v. Rabinowitz*, 339 U.S. 56 (1950).

<sup>101</sup> The two cases are carried forward to the October, 1950 Term, as *Compagna v. Hiatt*, 19 U. S. L. Week 3001 (July 7, 1950); and *Dowd v. Cook*, *Ibid.*, at 3002.

<sup>102</sup> *Cassell v. Texas*, 339 U.S. 282 (1950).

<sup>103</sup> *Quicksall v. Michigan*, 339 U.S. 660 (1950). The rule applies to noncapital state court cases.

persons are entitled to counsel as a constitutional right, is thus reduced to two—Justices Black and Douglas.

The more important cases were the two overrulings of decisions of Justice Murphy. In *Wade v. Mayo*,<sup>104</sup> the Court through Justice Murphy had held that while a state prisoner claiming violation of a constitutional right at his trial must exhaust his state remedies before applying to the federal district court for habeas corpus, that exhaustion rule did not require him to pursue his "state remedies" to the point of petitioning the United States Supreme Court for certiorari from the state supreme court. This year Justice Reed, in *Darr v. Burford*,<sup>105</sup> overruled the *Wade* decision, to which he had previously dissented.

Since there are hundreds, and perhaps more than a thousand, convicted persons raising constitutional objections each year, and since the Supreme Court could not conceivably review the cases of more than a few of them, the new rule puts another blind alley in the labyrinth of procedures already confronting the convicted. In remarks to the circuit judges at the beginning of the term, Chief Justice Vinson emphasized the importance of assurance of a fair trial by proper post-conviction procedures. He said, "I firmly believe, despite the burden, that the right to petition the Supreme Court should remain and should not be made any more difficult."<sup>106</sup> It now remains, but it is certainly more difficult. Justices Frankfurter, Black, and Jackson dissented, and Justice Douglas did not participate.

The search and seizure problem of *United States v. Rabinowitz*<sup>107</sup> involved the circumstances under which a warrantless search may accompany a validly warranted arrest. Up to four years ago, the law on that subject had been clear and workable: a search without a warrant accompanying a proper arrest could reach only objects in plain sight. The police were thus not required to blind their eyes to the obvious, but they were precluded from rummaging and ransacking.<sup>108</sup> At the 1946 term, in *Harris v. United States*,<sup>109</sup> the Court suddenly swung far, and a conviction was sustained based on an arrest following a five hour ransacking of a house without a search warrant. The defendant had been validly arrested, but for something quite different from that with which he was charged after the search.

<sup>104</sup> 334 U.S. 672 (1948).

<sup>106</sup> 70 S. Ct., at xvi.

<sup>105</sup> 339 U.S. 200 (1950).

<sup>107</sup> 339 U.S. 56 (1950).

<sup>108</sup> *Marron v. United States*, 275 U.S. 192 (1927), as modified in *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), and *United States v. Lefkowitz*, 285 U.S. 452 (1932).

<sup>109</sup> 331 U.S. 145 (1947), discussed briefly, 1946 Term article, 24 et seq.

At the 1947 term, the Court swung just as far the other way. In *Trupiano v. United States*,<sup>110</sup> Justice Murphy introduced a modification into both the *Harris* rule and the preceding "plain sight" rule. His opinion required police to have a warrant if there was reasonable opportunity to obtain one. But this made the law look foolish; in *Trupiano* "search" which consisted of noticing the stills which surrounded a moonshiner, when he was validly arrested, was held illegal because the police could have obtained a search warrant.

The only happy solution to the extreme of *Harris* and the counter-extreme of *Trupiano* would be to overrule both of them and put the law back in the perfectly satisfactory shape it had before the "improvements" began. In the *Rabinowitz* case, the Court, in an opinion by Justice Minton, overruled *Trupiano*. The case may also indicate an intention to put some limitation on *Harris*. In *Rabinowitz*, a warrant was issued for the arrest of the defendant for dealing in forged postage stamps. He was arrested in the small room in which his business was carried on, and the police without a warrant, searched his desk, safe, and file cabinet and found forged stamps. In upholding the conviction the Court emphasized, among other points, that these receptacles, at least, were in plain sight, that the search was confined to the room actually used for unlawful purposes, and that the objects found were immediately related to the purpose of the arrest. These factors differentiate the *Harris* case. It was of course unnecessary to reaffirm *Harris* in toto, and the Court did not do so. Whether it would do so if the question were presented thus remains a partially open question.

#### b) Congressional procedures.

Activities in Congress continued at the center of the civil rights stage during the year 1949-50. Those activities took two primary forms. Most dramatic was the repetition of fabulous charges by a few irresponsible but noisy persons. By the end of the year, the process of indiscriminate and unsupported accusations was beginning to meet strong opposition from leaders of both parties.<sup>111</sup>

Those abuses of democratic process were the backdrop for the other congressional activity, committees of inquiry. The committees, armed with the subpoena power, searched for evidence which might lend credence to the unsupported charges which had precipitated them. As a result, a

<sup>110</sup> 334 U.S. 699 (1948).

<sup>111</sup> Consult, for example, the remarks of Senator Margaret Chase Smith, 96 Cong. Rec. 8001 (June 1, 1950).

series of legal problems arising from the committees' activities are beginning to reach the Court.

In the committee hearings, witnesses are in a difficult position. If they answer questions, they risk the possibility that some renegade may turn up to be believed on a charge of perjury. If they decline to answer, they may be held in contempt. An increasing number have chosen to risk the contempt charge.

In *United States v. Bryan*,<sup>112</sup> the issue was whether excerpts from testimony could be read to a jury to convict a witness of contempt in view of a statutory provision that "no testimony given by a witness before any committee of either House shall be used as evidence in any criminal proceeding . . . except perjury." Defendant, charged with contempt, rather than with perjury, contended that the testimony which was the basis of the alleged contempt could not be read to the jury. The majority, through Justice Vinson found this an "absurd conclusion" which was not within "the congressional purpose" although it was within the literal language of the statute. Justices Black and Frankfurter dissented, Justice Black contending that this restriction was no more absurd than the limitation on self-incrimination in the Fifth Amendment.

More important was *United States v. Fleischman*,<sup>113</sup> a companion to the *Bryan* case. Bryan was the actual custodian of the records of the Joint Anti-Fascist Committee. His refusal to produce the records was regarded as contempt. Fleischman was a member of the board of directors of that organization and had only as much control over those records as one member of a board of sixteen might have. The Court, again through Chief Justice Vinson, affirmed a judgment of her contempt despite the fact that the government did not prove that she could have done anything effective about the records. The majority held such proof unnecessary, concluding that in this case the burden of proof was on the defendant, to prove that she could not have had any influence on the board, rather than on the government. Justices Black and Frankfurter, dissenting vigorously, protested this transfer of the burden of proof to the defendant on the critical issue of the case. The dissent also hit hard at the indefiniteness of an order which somehow required the defendant to "try" to compel others to produce papers, without any indication of just what she was expected to do.

Related, insofar as they arose from the loyalty program, were two cases involving juries in the District of Columbia. In *Dennis v. United States*,<sup>114</sup> defendant was charged with contempt of the House Un-American Com-

<sup>112</sup> 339 U.S. 323 (1950).

<sup>113</sup> 339 U.S. 349 (1950).

<sup>114</sup> 339 U.S. 162 (1950).

mittee. Seven of his jurors were government employees. The Court held this not prejudicial in the circumstances. The majority opinion by Justice Minton, with a concurrence by Justice Reed, refused to hold that the loyalty program did not disqualify government jurors. Indeed, a defendant was entitled to show that jurors might be disqualified for this reason.<sup>115</sup> However, at the time of the *Dennis* conviction, the Court thought the loyalty program was sufficiently new so that it could not, at that time, have created such a *Gestapo* atmosphere as to invalidate the conviction.

Justice Black, dissenting, said: "Government employees have good reason to fear that an honest vote to acquit a Communist or anyone else accused of 'subversive' beliefs, however flimsy the prosecutor's evidence, might be considered a 'disloyal' act which could easily cost them their job. That vote alone would in all probability evoke clamorous demands that he be publicly investigated or discharged outright; at the very least it would result in whisperings, suspicions, and a blemished reputation."<sup>116</sup>

Justice Frankfurter, dissenting, said: "Only naiveté could be unmindful of the force of the considerations set forth by Mr. Justice Black, and known of all men. There is a pervasiveness of atmosphere in Washington whereby forces are released in relation to jurors who may be deemed supporters of an accused under a cloud of disloyalty. . . ."<sup>117</sup>

### c) *Free Speech.*

*American Communications Ass'n v. Douds*<sup>118</sup> is the most important decision on free speech in more than ten years. It begins a new cycle in the rising and falling history of the "clear and present danger" test.

The clear and present danger test arises from the fact that while the First Amendment in terms prohibits any interference with freedom of speech, no judge has yet been found on the Supreme Court who is willing to apply the rule as an absolute. The problem of how free speech should be qualified has been particularly perplexing for the last thirty years.

During World War I, Holmes enunciated his classic test, that speech might not be prohibited unless there was a clear and present danger of a

<sup>115</sup> In *Morford v. United States*, 339 U.S. 258 (1950), the Court, per curiam, reversed a decision in a case similar to that of *Dennis* in which the defendant had not been allowed "to interrogate prospective government employee jurors upon voir dire examination with specific reference to the possible influence of the 'Loyalty Order'. . . ." At 259. For an excellent and comprehensive discussion of the problem, consult *Heller, Justice, Jury Trials, and Government Service*, 35 *Corn. L. Q.* 814 (1950). Mr. Heller observes, "If the loyalty program places government employees in a category by themselves, the law can hardly close its eyes to such distinction." *Ibid.*, at 823.

<sup>116</sup> 339 U.S. 162, 180 (1950).

<sup>117</sup> *Ibid.*, at 182.

<sup>118</sup> 339 U.S. 382 (1950).

substantive evil which Congress had the right to prohibit.<sup>119</sup> Holmes's analysis there applied to "political speech"—to speech directed to affairs of state, and he had in mind punishment of the traditional fine or imprisonment variety.

In the mid-1920's, such cases as *Gitlow v. New York*<sup>120</sup> and *Whitney v. California*<sup>121</sup> abandoned the clear and present danger test, substituting for it the so-called "bad tendency" test under which there was no longer a necessity of showing a real likelihood of serious consequences of speech, but rather merely a possibility of such consequences.

The Holmes-Brandeis point of view received its ultimate statement in their concurrence in the *Whitney* case. Vital passages from their opinion in that case are these: "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. . . . [E]ven advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."

But who was to make the factual judgment implied by this test? Justices Brandeis and Holmes continued, "In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. . . . It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."<sup>122</sup>

In the *American Communications Ass'n* case the issue was the validity of a provision in the Taft-Hartley Act excluding from the protections of that Act any union which has not appropriately shown both that its officers are not Communists and second, that its officers do "not believe in" or support any "organization that believes in or teaches" the overthrow of the government. The statute thus requires an oath both as to personal conduct and as to individual beliefs, and also requires the officer to take oath as to the "belief" of an organization. The principal

<sup>119</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>120</sup> 268 U.S. 652 (1925).

<sup>121</sup> 274 U.S. 357 (1927). The cases are well described in Chafee, *op. cit.* *supra* note 85, at 319-51.

<sup>122</sup> The quotations are from the concurring opinion, 274 U.S. 357, 376-79 (1927).

opinion by Chief Justice Vinson, holding the Act valid, took the following positions:

(1) Substantial evidence was presented to Congress, on the persuasiveness of which the Court did not pass, showing that Communists engage in political strikes.

(2) The restriction of the Act is more than a disqualification of individuals to hold office: "We are, therefore, neither free to treat Section 9 (h) as if it merely withdraws a privilege gratuitously granted by the Government, nor able to consider it a licensing statute prohibiting those persons who do not sign the affidavit from holding union office. . . . The difficult question that emerges is whether, consistently with the First Amendment, Congress, by statute, may exert these pressures upon labor unions to deny positions of leadership to certain persons who are identified by particular beliefs and political affiliations."

(3) Congress under the commerce power may attempt to prevent political strikes. Restrictions of this kind are similar to restrictions on bank directors in the underwriting business: "Political affiliations of the kind here involved, no less than business affiliations, provide rational ground for the legislative judgment. . . ."

(4) The clear and present danger test is not a mathematical formula. Justice Brandeis in the *Whitney* case was considering restrictions on dissemination of doctrine. This case is different—here Congress is protecting commerce from interruption. The "danger" to be protected against need not be anything so spectacular as danger to the nation. "[L]egitimate attempts to protect the public . . . from present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights."

(5) The Court must weigh the circumstances and appraise the substantiality of the reasons for such restrictions; but the Court must give due deference to Congressional judgment. Congress has not attempted to restrain the activities of the Communist Party as a political organization. The provision touches "only a relative handful of persons," and even that handful suffers only "possible loss of positions."

(6) The "belief" provision is so broad that it must be saved by narrow construction. The "belief" is therefore interpreted to mean a "belief in the objective of overthrow by force or by any illegal or unconstitutional methods of the Government of the United States as it now exists under the Constitution and laws thereof."<sup>123</sup>

<sup>123</sup> The quotations are from the opinion of the Court, 339 U.S. 382, 390-408 (1950).

Other contentions may be put aside. Justice Jackson concurred on all points except the belief provision, which he thought unconstitutional. His concurrence was even more extreme than the majority opinion on its points of agreement. He declared—in dramatic derogation of positions previously held by him—that as a judge he had no power to review this legislation except to determine whether there was “rational basis” for it.<sup>124</sup> Justice Black dissented as to all aspects of the opinion.

The majority opinion is summarized in some detail so that it may speak for itself. It makes prodigious innovations in the law of free speech. If the Court had merely upheld the statute, its impact might not have been so great; indeed, conceivably Holmes and Brandeis by applying their test might have come to the same result. But the opinion goes infinitely beyond the simple needs of the occasion, almost suggesting that we are to go back again to the *Gitlow* rule. In my own view, the opinion is a misfortune in these respects:

(1) “Conventional” restrictions of freedom of speech ordinarily consist of putting the offender in jail. Our own generation is finding more sophisticated ways of achieving the same result by putting economic instead of criminal sanctions on persons whose speech is offensive. These sanctions ought to be recognized as mere variants of criminal sanctions, and ought to be subject to the same tests. In the foreparts of this opinion, the Court appears to concede part of this vital ground, admitting that the exclusion from union office is more than the “mere loss” of a position. But later it appears to abandon the recognition that this is a penalty, and somehow minimizes it. This will encourage the belief that Congress can do indirectly what it may not be able to do directly by way of suppression of individual rights.

(2) In the course of restating a clear and present danger test, the Court certainly does not improve upon it. Even friends of the test must concede that it was somewhat elusive,<sup>125</sup> but now it defies comprehension.

<sup>124</sup> Justice Jackson had previously been an exponent of the view that “The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.” *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 639 (1943).

Another aspect of the case was the allegation that the oath provision was a bill of attainder. For an interesting pre-decision discussion, consult Wormuth, *On Bills of Attainder*, 3 *West. Pol. Q.* 52 (1950).

<sup>125</sup> A most illuminating analysis of the concept is Nathanson, *The Communist Trial and the Clear-and-Present-Danger Test*, 63 *Harv. L. Rev.* 1167 (1950).



(3) The ultimate serious questions in these cases are, first, who is to decide whether there is a clear and present danger, and second, what standard is to be applied? In respect to the first of these questions, the majority opinion is closer to Holmes and Brandeis than the Jackson opinion, because the Jackson opinion abdicates this function altogether. But the majority opinion saves very little because of its answer to the second question. Its standards are so low that almost any act of Congress would appear to meet them. If the Court does not see any close relation in a restraint on banking practices and a restraint on free speech, it leaves very little of the First Amendment. Moreover, it sets forth none of the actual facts which appear to lead it to the conclusion that there is a clear and present danger.

(4) The opinion leaves the impression that free speech is more subject to restriction when Congress is exercising the commerce power than would be the case if it were exercising some other power. It is novel for Congress to attack free speech with this weapon, but it is not true that any important difference should result.

(5) This is the first case in American history in which belief as such, completely unrelated to individual action of any kind, has been made the basis of limitations on the rights of a citizen.

The Black dissent comes close to declaring that speech, as such, should be beyond all legislative control until individuals commit illegal overt acts: "[T]he basic constitutional precept [is] that penalties should be imposed only for a person's own conduct, not for his beliefs or for the conduct of others with whom he may associate. Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however much we abhor the ideas which they advocate. . . . Like anyone else, individual Communists who commit overt acts in violation of valid laws can and should be punished. But the postulate of the First Amendment is that our free institutions can be maintained without proscribing or penalizing political belief, speech, press, assembly, or party affiliation."<sup>126</sup>

#### *d) Segregation.*

This year the National Association for the Advancement of Colored People, and its numerous friends, carried to the Court what it intended to be its ultimate challenge to legally imposed segregation. Southern representatives girded for a last ditch fight. When the smoke had cleared, the

<sup>126</sup> 339 U.S. 382, 452 (1950).

NAACP had made less progress than it had hoped, but at least as much as it could have expected.

The familiar story need not be repeated for any one likely to see these words. The equal protection clause of the Fourteenth Amendment was inserted by victorious abolitionists to secure "equal rights" for Negroes. The pattern of segregation in America was then just emerging, and there is legitimate room for confusion over just what the phrase was intended to accomplish in respect to it. One answer to the Amendment was the widespread institutionalization of segregation. As Reconstruction fervor receded, the lords of creation reached a polite compromise under which Negroes were to be kept "separate but equal"; and that compromise received at least qualified sanction from the Supreme Court in 1896 in *Plessy v. Ferguson*.<sup>127</sup>

There were three cases this year. In the case of *Sweatt v. Painter*<sup>128</sup> the petitioner had been excluded from the regular University of Texas law school and referred to a special, colored law school set up by order of the lower court in this case. He declined that alternative and sued for admission to the University of Texas. In *McLaurin v. Oklahoma State Regents*<sup>129</sup> the petitioner had been admitted to the University of Oklahoma graduate school, but was segregated in various ways by special seating restrictions, special dining restrictions, and special library restrictions. In *Henderson v. United States*<sup>130</sup> the petitioner had been excluded from a dining car because the few curtained-off "colored tables" were taken, though there were other empty "white tables" in the car.

In each case, the NAACP attempted to precipitate the issue of the validity of segregation as such. Supported both on brief and orally by the Attorney General and the Solicitor General, they asked that *Plessy v. Ferguson* be overruled. Briefs were compendious,<sup>131</sup> and oral arguments extensive and well attended by an interested public. The Attorney General, who tradition dictates may speak unquestioned, is said to have presented a powerful and effective statement, gravely warning the Court that "Unless segregation is ended, a serious blow will be struck at our democracy before the world."<sup>132</sup>

<sup>127</sup> 163 U.S. 537. The historical material bearing on the subject is collected in Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131 (1950).

<sup>128</sup> 339 U.S. 629 (1950).

<sup>129</sup> 339 U.S. 637 (1950).

<sup>130</sup> 339 U.S. 816 (1950).

<sup>131</sup> That of the Committee of Law Teachers against Segregation in Legal Education was reprinted sub nom. *Segregation and the Equal Protection Clause*, 34 Minn. L. Rev. 289 (1950).

<sup>132</sup> 18 U. S. L. Week 3277 (Apr. 11, 1950).

The Court did not reconsider the *Plessy* decision as the Negroes and the government asked, nor reaffirm it as the defendants requested. Rather it found sound reasons for deciding the cases on other grounds.

In the *Sweatt* case, the Court held the colored school "unequal" to the white school and therefore declared that Sweatt need not attend it. The important point was the breadth of the reasoning. The Court noticed, but did not stop with, the mechanical inequalities of difference in faculty size, course offerings, or libraries. Those are factors which, conceivably, enough money could cure. But the Court went on to those larger factors which, by their very nature, undercut all segregation at the graduate level. It noted "those qualities which are incapable of objective measurement but which make for greatness in a law school," the reputation of the faculty, quality of administration, influence of alumni, standing in the community, traditions, and prestige.

"The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85 per cent of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School."<sup>133</sup> This criterion should doom any segregated law school, and all the criteria taken together should knock out any segregated graduate school.

So construed, *Sweatt* requires that Negroes be admitted to general state graduate schools. *McLaurin* forbids segregation of students after their admission. It holds that a school may not "set apart" its students, because the restrictions would impair effective study and also handicap the students who wish "to engage in discussions and exchange views with other students."<sup>134</sup>

The *Henderson* case avoided the constitutional issue by holding that a provision of the Interstate Commerce Act forbade this type of discrimination. That provision, however, is so close in substance to the constitutional provision that the difference should not be significant.<sup>135</sup> The case is im-

<sup>133</sup> 339 U.S. 629, 634 (1950).

<sup>134</sup> *Ibid.*, at 641.

<sup>135</sup> The statute forbids subjection of any person "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and thus in effect makes the same mandate as the equal protection clause when it is interpreted to forbid "unreasonable classifications." 24 Stat. 380 (1887), 49 U.S.C.A. § 3(1) (1929).

portant both because at least one kind of dining car segregation is declared "unreasonable," and because the unreasonableness lies solely in the fact of the separation of the races. The food, the prices, and the service were otherwise the same.

The largest intellectual importance of these cases is that while they purport not to touch *Plessy v. Ferguson*, they do extensively undermine it. *Plessy* rested on a practical judgment that the judiciary was incapable of doing anything effective about race relations; hence the Court bowed to the inevitable. The *Plessy* majority was perfectly explicit about this.<sup>136</sup> The fact that the Court is now moving in this field shows that it does not share the complete pessimism of the *Plessy* majority.

*Plessy* necessarily surrounded its practical judgment with some legalisms. One of these was that segregation is not a white judgment of colored inferiority, and therefore a discriminatory practice; and that if Negroes think otherwise it is because they are unduly self-conscious.<sup>137</sup> The other was that segregation is not discriminatory because, while it is true that Negroes are kept out of white units, whites are kept out of Negro units, thus creating an equality of restriction.<sup>138</sup> The recent decisions attacked both those premises. *Sweatt* flatly repudiated the second, saying, "It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities."<sup>139</sup>

The practical effects of the decisions are already beginning to appear. Texas has admitted *Sweatt* to its law school, and there will be at least two more Negroes in that University. Oklahoma announced that there would be 82—unsegregated—graduate students in its various divisions in the summer of 1950.

On the other hand, Governor Talmadge of Georgia spouts fire at the thought of mixed education, and the Alabama legislature passed a most critical resolution and declared that it would not have mixed education in its lower schools.<sup>140</sup>

<sup>136</sup> The discussion at 163 U.S. 537, 550-52 takes the ground that law is "powerless" before "usages, customs and traditions" of race.

<sup>137</sup> The Court said that segregation did not stamp "the colored race with a badge of inferiority"; if it did so, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Ibid.*, at 551.

<sup>138</sup> Justice Harlan, dissenting, discussed this point in some detail. *Ibid.*, at 557.

<sup>139</sup> 339 U.S. 629, 634 (1950).

<sup>140</sup> The data in the two foregoing paragraphs is taken from miscellaneous news clippings. It is widely believed that reaction against the decisions in North Carolina caused the defeat of liberal Senator Frank Graham in a runoff primary immediately following the opinions.

The Alabama furor suggests the real problem of these cases. There is good reason to believe that many Southerners do not feel nearly as strongly about maintaining segregated education at the graduate level as they do about maintaining it in the grades. Assuming that such education must be even close to equal in fact, it is too expensive to maintain two systems.<sup>141</sup>

What the South wants to avoid is (a) mixed primary and secondary education, and (b) the expenditure of the estimated billion dollars it would cost to put their primary and secondary systems into a state of even superficial equality. This year's decisions, by avoiding the ultimate question of *Plessy v. Ferguson*, do not decide whether the South must do one or the other. But by moving toward a test of *real* equality, the Court gives an omen that it means business up and down the line.

#### SUMMARY OF CIVIL RIGHTS POSITIONS

A summary of the positions of the Justices in the nonunanimous civil rights cases follows. As always, such data must be read with the greatest of care, for they may be misleading. This year very special warning must be given that the table includes *only* the cases in which the Court divided. The segregation cases therefore, are not in this table.

In comparing this table with the data for previous years, it should be remembered, as will be shown in some detail, that the departure of two Justices broke the group of four which previously had been able to grant certiorari in many civil rights cases. Denials of certiorari undoubtedly kept some potential cases out of this table which might otherwise have shown more greatly the differences of view between Justices Black and Douglas and some of their brethren.

When all the necessary qualifications are made, this table nonetheless has substantial residual value. If a given Justice's decisions put him preponderantly in one column or the other, then the figures contain a clue or hint as to his basic attitudes about civil rights.

There were fifteen divided civil rights cases at the 1949 term.<sup>142</sup> Dis-

<sup>141</sup> An exchange in the oral argument between Justice Minton and Oklahoma's Assistant Attorney General Hansen is suggestive: Justice Minton: "When segregation has broken down as it has in Oklahoma, there isn't much point to segregation, is there?" Mr. Hansen: "Possibly [not] on the graduate's level." 18 U. S. L. Week 3280 (April 11, 1950).

<sup>142</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *Building Service Union v. Gazzam*, 339 U.S. 532 (1950); *Cassell v. Texas*, 339 U.S. 282 (1950); *Dennis v. United States*, 339 U.S. 162 (1950); *Int. Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Quicksall v. Michigan*, 339 U.S. 660 (1950); *Solesbee v. Balkcom*, 339 U.S. 9 (1950); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *United States v. Alpers*, 338 U.S. 680 (1950); *United States v. Bryan*, 339 U.S. 323 (1950);

qualifications or absences result in some Justices having less than this number.

TABLE 1  
DISTRIBUTION OF VOTES IN NONUNANIMOUS CIVIL RIGHTS CASES

	IN SUPPORT OF CLAIMED RIGHT				IN DENIAL OF CLAIMED RIGHT			
	1946-			Per Cent of Total	1946-			Per Cent of Total
	1949	48	Total		1949	48	Total	
Vinson	2	8	10	13%	13	49	62	87%
Black	14	39	53	75	1	17	18	25
Reed	2	8	10	13	13	49	62	87
Frankfurter	11	23	34	47	4	34	38	53
Douglas	2	47	49	83	0	10	10	17
Jackson	6	14	20	29	9	41	50	71
Burton	3	10	13	16	12	47	59	84
Clark	1	.....	1	13	7	.....	7	87
Minton	3	.....	3	20	12	.....	12	80

#### IV. LAWYERS' LAW

Except for the developments relating to certiorari, there was substantially nothing of interest this year in conflicts, federal jurisdiction, procedure, or legislation. The only exceptions arose in connection with the form of notice required by due process. In an outstanding discussion of the subject, Justice Jackson for the Court declared invalid a New York attempt to settle the accounts of a common trust fund after notice by publication. Thrusting aside the technicalities of "in rem" and "in personam," he declared that the interests to be balanced in requiring a type of notice are those of the state in settling fiduciary accounts, and those of the individual to actual notice. Where notice is to be required, "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Hence where beneficiaries can by due diligence be located, though outside the state, they must have actual notice. As to all others, published notice will have to do.<sup>143</sup>

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United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950); United States v. Fleischman, 339 U.S. 349 (1950); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); United States v. Rabinowitz, 339 U.S. 56 (1950).

Osman v. Douds, 339 U.S. 846 (1950), is essentially a duplicate of the American Communications Ass'n case. It is included in this table only to note the views of Douglas and Minton, JJ., who did not participate in the American Communications Ass'n decision.

Unanimous civil rights cases, in addition to the three segregation decisions cited notes 128-30 supra, were *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Morford v. United States*, 339 U.S. 258 (1950); *Roberts v. U.S. Dist. Ct.*, 339 U.S. 844 (1950).

<sup>143</sup> *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

Equally practical was the majority in *Travelers Health Ass'n v. Virginia*.<sup>144</sup> There the issue was whether Virginia could effectively serve a complaint by mail on an insurance company which was not in any technical way doing business in Virginia—except that it was selling insurance to Virginia residents by mail, as a result of general advertisements. Justice Black for the majority held that this was “doing business” quite sufficiently to permit mailed service to be binding under the Constitution.

#### THE WRIT OF CERTIORARI

As Justice Frankfurter puts it, “All that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted.”<sup>145</sup> In other words, the grant or the denial of the writ is wholly discretionary. But in the exercise of discretion to decline to hear, as in the exercise of other judicial discretion, patterns may appear. Some began to emerge in the new policies of the new Court.

These features stand out in the practices developing this year:

1. The Court is apparently desirous of cutting its docket to a very low volume. That level dropped so low this year that three Justices as prolific as Hughes or Brandeis or Stone could have written all the majority opinions of 1949-50 with no perceptible strain.

The Court is compressing its docket (a) by denials of certiorari; (b) by disposing of ten per cent of the few cases heard by per curiam opinions; (c) by very summary treatment of some matters. The Court's treatment of *Dye v. Johnson*<sup>146</sup> is illustrative. That case raised very substantial and difficult questions of whether, in the circumstances, the Georgia chain gang was a “cruel and unusual punishment,” and if so, whether a federal court might block an extradition back to Georgia through the writ of habeas corpus. The issues are sufficiently difficult to have given a superb court, the third circuit, a difficult time. Sitting en banc, that Court, through its distinguished senior Judge Biggs, decided the matter in a most interesting and earnest way. The Supreme Court summarily reversed without hearing argument, giving no discussion, and citing only one case,

<sup>144</sup> 339 U.S. 643 (1950). *Barr v. Burford*, 339 U.S. 200 (1950), involving the jurisdictional question of the nature of the exhaustion of state remedies in habeas corpus cases, and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), involving jurisdiction of American courts in habeas corpus suits by foreign prisoners, were discussed above in the civil rights section. Other cases involving jurisdictional points were *Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263 (1949) (venue under FELA); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1950) (finality of order under Rule 54(b) prior to its recent amendment).

<sup>145</sup> *State v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950).

<sup>146</sup> 338 U.S. 864 (1949), reversing, per curiam, 175 F. 2d 250 (C.A. 3d, 1949).

and that one not clearly in point.<sup>147</sup> Such abrupt disposition of a serious matter leaves the third circuit and the bar in real confusion.

2. The Court is using its discretionary power to eliminate from its docket civil liberties problems which would have disturbed its predecessor Court. As was noted above, all but one of the criminal procedure cases heard this year were left over from the year before; and only two certioraris were granted in that field since January 1st.

The new method of administering the certiorari jurisdiction amounts to a new conception of the purposes of the Judiciary Act of 1925. That act was intended to allow the Justices adequate time for serious issues, but it had not previously been supposed that they would need so much time as to result in a reduction of the docket to an average of only about ten cases per year per Justice.<sup>148</sup>

## V. THE INSTITUTION AND ITS JUSTICES

### THE WORK OF THE INSTITUTION

As has been noted, the number of cases decided by opinion, including per curiams but excluding companion cases, was 94. At the preceding term the number was 122, and the term before that it was 119. Before the war, the docket usually ran to 200 and more cases a year. This reduction in the size of the docket this year was due primarily to the extraordinary rigor, discussed in the immediately preceding section, with which the writ of certiorari was administered.

It was at the same time a season of extraordinary difficulty for the Court due to new and ailing personnel. Mr. King, in his biography of Chief Justice Fuller, suggests that "perhaps the worst year in the history of the Court was the term commencing in October, 1909, and ending in May, 1910, just prior to Fuller's sudden death in July of that year. Justice Moody was entirely incapacitated, Justice Peckham died in October, and Justice Brewer the following March."<sup>149</sup> The October, 1949 term was

<sup>147</sup> 338 U.S. 864 (1949). The order of the Court states, "The petition for writ of certiorari is granted and the judgment is reversed. *Ex parte Hawk*, 321 U.S. 114." (1944). A reading of the *Hawk* case will give very little illumination. Did the Court mean (a) all persons in Johnson's position must bring their petitions in the court of the state in which they are a fugitive; or (b) in the court of the state of their original incarceration; or (c) did it mean merely that Johnson, as an individual, having started his own case in a Pennsylvania state court, would not thereafter be allowed to raise the issue in a federal court though other persons might do so if they had not made that beginning? For discussion of the problem, see *Prisoners' Remedies for Mistreatment*, 59 *Yale L.J.* 801 (1950). The Second Circuit, inferentially admitting that it was puzzled, has given interpretation (a) to the order. *U.S. ex rel. Jackson v. Ruthazer*, 181 F. 2d 588 (C.A. 2d, 1950).

<sup>148</sup> An appendix, p. 52 *infra*, lists some of the cases denied certiorari this past session.

<sup>149</sup> King, *Melville Weston Fuller* 309 (1950).



almost as greatly handicapped, with two new Justices coming on the bench at the beginning of the year, Justice Douglas gone for almost the entire year, and Justice Reed, though able to participate in all the cases, in variable health.

One of the most obvious differences in the execution of the work of the Court was the increase of brevity.<sup>150</sup> This clearly was due in part to the decline in the volume of dissents. The departure of Justices Murphy and Rutledge removed two very free dissenters, thus creating a greater unanimity.

The distribution of majority opinions among the Justices is shown in Table 2.<sup>151</sup>

TABLE 2  
DISTRIBUTION OF MAJORITY OPINIONS

Vinson.....	10	Jackson.....	13
Black.....	12	Burton.....	9
Reed.....	5	Clark.....	12
Frankfurter.....	8	Minton.....	12
Douglas.....	4	Per curiam.....	9

The loss of two of his closest intellectual associates and the absence of Justice Douglas reduced the influence of the views of Justice Black to the lowest point they have had for many years. For all practical purposes, the ruling group in the Supreme Court today is Chief Justice Vinson, Justice Burton, Justice Clark, Justice Minton, and any one other Justice—usually Justice Reed.

These conclusions are illustrated by the tables that follow. The degree of prevalence of the views of particular justices can best be measured by concentrating on the most important of the decisions, and for this purpose I have arbitrarily shown two groups of cases which seem to me to have the most important consequences to society. The first group consists of the five cases which seem the most significant of the year.<sup>152</sup> The second group of 21 cases are definitely less important, but are not routine.<sup>153</sup>

<sup>150</sup> Using a measure of pages alone, the October, 1948, term occupies 1,483 pages in the Supreme Court Reporter, and the October, 1949, term occupies 1,032. Thus, the Court handled about 20 per cent less cases in about 30 per cent less pages.

<sup>151</sup> This is a strict count, excluding simple companion cases, cases not argued, and cases disposed of with an order not amounting to even a simple per curiam opinion.

<sup>152</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *Int. Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *United States v. Rabinowitz*, 339 U.S. 56 (1950).

<sup>153</sup> *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950); *Building Service Employees v. Gazzam*, 339 U.S. 523 (1950); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Civil Aeronautics Bd. v. State Airlines Inc.*, 338 U.S. 572 (1950); *Darr v. Bur-*

The data in Tables 3 and 4 are taken from these two groups. Disqualifications give some Justices less than the total of 26.

Table 5 shows the detailed breakdown of the agreements among Justices in major and important cases.

TABLE 3  
VOTING DISTRIBUTION IN MAJOR AND IMPORTANT CASES

JUSTICE	MAJORITY VOTES			DISSENTING VOTES		
	Major	Important	Total	Major	Important	Total
Vinson	5	20	25	0	0	0
Black	2	15	17	3	6	9
Reed	4	16	20	1	5	6
Frankfurter	4	12	16	1	9	10
Douglas	2	3	5	1	3	4
Jackson	4	13	17	1	6	7
Burton	5	18	23	0	2	2
Clark	4	18	22	0	0	0
Minton	3	17	20	1	3	4

TABLE 4  
PERCENTAGE IN MAJORITY MAJOR  
AND IMPORTANT CASES

Vinson	100
Black	65
Reed	77
Frankfurter	60
Douglas	55
Jackson	78
Burton	92
Clark	100
Minton	83

#### THE WORK OF THE INDIVIDUAL JUSTICES

Chief Justice Vinson, after four years on the bench, is now far more influential due to the new Truman appointees. There is no reason to suppose either that he dominates them or that they dominate him; rather, the group is like-minded. As has been shown throughout this article, and par-

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ford, 339 U.S. 200 (1950); *Dennis v. United States*, 339 U.S. 162 (1950); *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950); *Graham v. Brotherhood of Locomotive Fireman & Enginemen*, 338 U.S. 232 (1948); *Henderson v. United States*, 339 U.S. 816 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Int. Union, UAWA, CIO v. O'Brien*, 339 U.S. 454 (1950); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950); *Powell v. U.S. Cartridge Co.*, 339 U.S. 497 (1950); *Secretary of Agric. v. Central Roig Refining Co.*, 338 U.S. 604 (1950); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *United States v. Texas*, 339 U.S. 707 (1950); *Travellers Health Ass'n v. Virginia*, 339 U.S. 643 (1950); *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950); *United States v. Fleischmann*, 339 U.S. 349 (1950); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950).

ticularly by the data in the immediately preceding section, his and their views now prevail in substantially every important instance.

One important difference between the Chief Justice's work this year and other years was in his selection of the opinions for himself. In some years past, he has chosen some very small matters. This year, however, he wrote the opinions of the Court in the two major segregation cases and in the Taft-Hartley free speech case.<sup>154</sup>

From the standpoint of quality, the opinions of the Chief Justice continue without marked distinction. The principal criticism made in these articles in years past has been that the Chief Justice on occasion either did not squarely face intellectual obstacles or skirted them in exceedingly ingenuous and devious fashion by highly verbal distinctions. That criti-

TABLE 5  
AGREEMENTS AMONG JUSTICES IN MAJOR AND IMPORTANT CASES

	Vinson	Black	Reed	Frank- furter	Jack- son	Burton	Clark	Minton
Vinson	..	16	19	15	17	23	18	19
Black	16	..	15	14	13	15	13	16
Reed	19	15	..	15	14	18	15	22
Frankfurter	15	14	15	..	21	14	12	13
Jackson	17	13	14	21	..	16	12	14
Burton	23	15	18	14	16	..	17	18
Clark	18	13	15	12	12	17	..	15
Minton	19	16	22	13	14	18	15	..

cism cannot be fairly repeated this year except for the Taft-Hartley free speech case, in which, to this reader, the opinion fails squarely to meet and overcome the obstacles between the Chief Justice and his result. From a technical standpoint, one of the best of the Chief Justice's opinions of the year was *United States v. Aetna Casualty Co.*,<sup>155</sup> a problem of subrogation under the Federal Tort Claims Act.

In his new position of "leader with allies," the Chief Justice remains a dominantly conservative influence in economic and civil rights matters. The one important exception is in race relations cases, in which he has

<sup>154</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>155</sup> 338 U.S. 366 (1949). The case is discussed briefly in James and Thornton, *The Impact of Insurance on the Law of Torts*, 15 *Law & Contemp. Prob.* 429, 438-39 (1950). Prof. Ehrenzweig, *Assurance Oblige*, *Ibid.*, at 444, 451, citing the case says, "The Supreme Court of the United States recently permitted accident insurers to recover as subrogees from the Federal Government under a federal statute which in terms protects only the injured himself. It is regrettable that the court in so holding failed to consider the underlying economic issue whether risk distribution through taxation, necessitated by admitting subrogation, is preferable to risk distribution through the increase of first party insurance premiums caused by the denial of subrogation."

written memorable, though in some instances cautious, opinions leading the way toward reform.<sup>156</sup>

For Justice Black, the 1949 term brought the wheel of judicial experience to full circle. In 1937, he came to the bench as a frequent lone dissenter. The years brought intellectual companions, and during the forties, his was a voice influential in the councils of the Court. In the year past, having outlasted his allies, he was again in the position of frequent dissenter. One difference was important: the intervening years have given Black a reputation as an outstanding jurist which means that the dissents have a following and weight.

For Black personally, the release from majority responsibilities permitted the first relaxation since his appointment. For years he had accepted no more than one speaking engagement during a term, if that; this year he made several addresses. For years his work routine was early morning till late night during the term of Court; this year he found time for a few days in the West to visit Justice Douglas.

Relaxation did not mean abandonment of duties. As always, he was among the first in volume of majority opinions written. Three of the outstanding from the standpoint of lawyer-like workmanship were *United States v. Commodities Trading Corp.*,<sup>157</sup> involving the cost in relation to ceiling prices of articles condemned in wartime; *FPC v. East Ohio Gas Company*,<sup>158</sup> applying the Natural Gas Act to certain intermediate transportation of gas; and *Solesbee v. Balkom*,<sup>159</sup> concerning the type of hearing which must be accorded allegedly insane persons before they may be electrocuted for capital offenses.

His dissents were forceful, if hopeless. In the Taft-Hartley free speech case, he scored guilt by association and reaffirmed his conviction that Americans should be punished as a result of political beliefs only for overt acts actually committed by them.<sup>160</sup> His dissenting opinion protesting the trial of a Communist before a jury largely composed of government employees, themselves all subject to the sanctions of the loyalty program, was read, according to a letter from a courtroom observer, "in a voice of scorn and steel."<sup>161</sup>

<sup>156</sup> The Chief Justice adds the segregation cases this year to a list which already included the Restrictive Covenant Cases, 334 U.S. 1, 24 (1948), and *Oyama v. California*, 332 U.S. 633 (1948), involving the California land laws directed against Japanese.

<sup>157</sup> 339 U.S. 121 (1950).

<sup>158</sup> 338 U.S. 464 (1950).

<sup>159</sup> 339 U.S. 9 (1950).

<sup>160</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950). For daring of concept, this dissent and the dissent in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), are remarkable.

<sup>161</sup> *Dennis v. United States*, 339 U.S. 162 (1950).

For Reed, the year was one of peculiar disappointment. His health waned at the very moment when his intellectual powers could have had their largest consequence. Reed is closer in his views to the Truman appointees than the remainder of the residual members of the Roosevelt Court. Black's fall is paralleled by Reed's rise in influence. For years, Reed has been the civil liberties right wing of the Court. Others have now been added to that wing. Reed's experience and ability, both most extensive, could make him the intellectual leader of the Truman group. He could well become the Sutherland to Vinson's Taft—the writer of the most important and most serious opinions for the new Court. By the end of the term the Justice's health was markedly improved, and he may well occupy that role in 1950-51.

But the Justice's stamina was not up to that opportunity this year. He wrote only five majority opinions, less than any one except Justice Douglas. One excellent example of treatment of a neat but small matter was *United States v. Burnison*,<sup>162</sup> holding valid a California statute which precludes testamentary gifts to the United States. The most important Reed opinion, and one which illustrates his new influence, was *Darr v. Burford*,<sup>163</sup> overruling *Wade v. Mayo*,<sup>164</sup> and holding that prisoners raising constitutional objections to their trials must not only exhaust state remedies but must, as a part of that exhaustion, petition for certiorari. He brushed aside the *Wade* case, in which he had dissented, with the passage, "We do not stop to reexamine the meaning of Wade's specific language. Whatever deviation *Wade* may imply from the established rule will be corrected by this decision." Unfortunately, Reed's opinions are not always as crisp and to the point as that in the *Burnison* case; the *Darr* case becomes repetitious.

Justice Frankfurter, as usual, wrote very few majority opinions, but he was otherwise active. His most important majority opinion was *Int. Brotherhood of Teamsters v. Hanke*,<sup>165</sup> drastically limiting the constitutional protections of picketing. This opinion is an excellent example of skillful use of legal materials. In other opinions, he continued his campaign to inform the bar and his brethren of the true meaning of the writ of certiorari,<sup>166</sup> and held to his one-man program to abandon the so-called

<sup>162</sup> 339 U.S. 87 (1950).

<sup>163</sup> 339 U.S. 200 (1950).

<sup>164</sup> 334 U.S. 672 (1948).

<sup>165</sup> 339 U.S. 470 (1950).

<sup>166</sup> See, e.g., *State v. Baltimore Radio Show*, 338 U.S. 912 (1950).

"rule of four" by refusing himself to participate in some matters which four of his brethren had decided to hear.<sup>167</sup>

The most colorful development concerning Frankfurter this year was that, after years of appearing at most a moderate on issues of civil rights, he has again been made into a "liberal" by the majority's turn to the right. Since the Black-Douglas wing of the Court no longer has the votes to grant certiorari in the cases which once divided them and Frankfurter, some of the differences among these Justices seemed to disappear. Frankfurter brought to his new alliance the pungency with which he had supported his old one, as when he referred to an immigration act in dissent: "I deem it my duty not to squeeze the Act of May 10, 1920, so as to yield every possible hardship of which it is susceptible."<sup>168</sup>

However, in terms of larger issues, Frankfurter was not nearly so completely isolated as Black. In the five major cases of the year, he was in dissent only on that one involving searches and seizures.<sup>169</sup> His limited concept of the role of the Court in reviewing alleged invasions of freedom of speech prevailed in the Taft-Hartley case,<sup>170</sup> and his majority opinion in the picketing case carries his whole philosophy of due process of law very firmly into an area where it had never been before.<sup>171</sup>

Due to a serious riding mishap, Justice Douglas was unable to rejoin the Court until Spring. During his recuperation he published a best seller on his mountain climbing experiences and in the Spring he was chosen most unwillingly "father of the year." By the Summer of 1950 he was sufficiently recovered to be able to undertake a new mountain climbing excursion in Iran.

The Justice returned to the bench in time to write four opinions, the most important of which was the Texas tidelands case, which well exemplifies his sure, quick, touch.<sup>172</sup> He also had the opportunity in a per

<sup>167</sup> Consult 1948 Term article, 37-38. Justice Frankfurter applied this view by refusing to participate in *Carter v. Atlantic & St. Andrews Bay Co.*, 338 U.S. 430 (1949); *Affolder v. N.Y. C. & St. L.R. Co.*, 339 U.S. 96 (1950); *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384 (1949). While Justice Frankfurter refused to participate in these cases which his brethren wished to hear, he continued to display his independence by filing an extended opinion replete with English authorities in *State v. Baltimore Radio Show*, 338 U.S. 912 (1950), which the other members of the Court chose not to hear.

<sup>168</sup> *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521 (1950).

<sup>169</sup> Cases cited note 152 supra.

<sup>170</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

<sup>171</sup> *Int. Brotherhood of Teamsters v. Hanke* 339 U.S. 470 (1950). A Collection of the Justice's opinions was published this year, Konefsky, *The Constitutional World of Mr. Justice Frankfurter*. Reviews with interesting insights into the Justice, pro and con, are Curtis and Rodell, 59 *Yale L. J.* 1009, 1013 (1950); Pritchett, 36 *Va. L. Rev.* 281 (1950).

<sup>172</sup> *United States v. Texas*, 339 U.S. 707 (1950). The serious new point raised by the Texas petition for rehearing, note 76 supra, does not detract from this conclusion. It had been overlooked in the original Texas brief.

curiam to note his view that the Taft-Hartley oath provision was unconstitutional.<sup>173</sup>

Justice Jackson had a fruitful year, writing thirteen majority opinions, and frequently exhibiting that freshness of view and superb writing style which are his trademarks. Two excellent examples of this fluency are his concurrence in the Taft-Hartley oath case, which was republished as an article in the New York Times magazine section and which reads as though it were designed for that purpose;<sup>174</sup> and his majority opinion in *United States v. Gerlach Livestock Co.*,<sup>175</sup> on eminent domain problems in connection with the Central Valley Project in California. This latter opinion may well be the best description, from a literary standpoint, which has ever been made of the Central Valley Project. The descriptive passages are at the expense of brevity, but the cost is small for the quality.

Occasionally the Jackson opinions have an elusive touch. The remand order in *Roth v. Delano*<sup>176</sup> is surely needlessly puzzling for a lower court; and his opinion on the treatment of Negro firemen by their union slides over the few points of moderate difficulty without much attempt to explain them.<sup>177</sup> On the other hand, his opinion in *Mullane v. Central Hanover Bank*,<sup>178</sup> on the requirement of notice in settling a common trust fund, is outstanding, as is his *O'Donnell v. Elgin, J. & E. Ry. Co.*, involving the Safety Appliance Act.<sup>179</sup>

Justice Jackson's sternest critics cannot complain that he is unimaginative. Illustrations are his dissenting opinion in a case in which the majority approved the disbarment by the Patent Office of an attorney who had planted a technical article under the signature of a purportedly impartial person and then cited it to the Patent Office as impartial evidence. Justice Jackson thought this mere ghost writing, a practice so common that the attorney could not be criticized for falling into it.<sup>180</sup> Another illustration of the Justice's novelty of view is his dissent in a case reversing

<sup>173</sup> *Osman v. Douds*, 339 U.S. 846 (1950). The relevant passage of this per curiam order, described in note 142 supra, is as follows: "Mr. Justice Douglas joins the dissenting opinions of Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Jackson insofar as they hold unconstitutional the portion of the oath dealing with beliefs, and being of the view that provisions of the oath are not separable votes to reverse. He therefore does not find it necessary to reach the question of the constitutionality of the other part of the oath."

<sup>174</sup> *American Communications Ass'n v. Douds*, 339 U.S. 382, 422 (1950) and quoted in "Justice Jackson on Communications in America," N.Y. Times, Mag. Sec., p. 12 (May 21, 1950).

<sup>175</sup> 339 U.S. 725, 727 (1950).

<sup>176</sup> 338 U.S. 226, 227 (1949).

<sup>177</sup> *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 233 (1949).

<sup>178</sup> 339 U.S. 306, 307 (1950).

<sup>179</sup> 338 U.S. 384, 385 (1950).

<sup>180</sup> *Kingsland v. Dorsey*, 338 U.S. 318, 320 (1949).

a conviction where there had been racial discrimination in the selection of a grand jury. The Jackson view was that so long as there was no discrimination at the jury trial stage, discrimination at the grand jury stage was immaterial, thus in effect saying that grand juries are inconsequential.<sup>181</sup>

The two worst handicaps which Justice Burton has had to battle as a judge have been his tendencies both to prolixity and to fuzziness in opinions. His strong point is *not* an instinct for the jugular, for the absolutely vital point of a case.<sup>182</sup> This year Justice Burton gained ground against those handicaps. His opinion on interest calculations on funds taken up by the Alien Property Custodian is very concise, and yet draws on general factors sufficiently to give full illumination to the discussion.<sup>183</sup> Another fine example is a decision concerning veterans' seniority under the Selective Service Act, carrying the law of that difficult and important subject "one step further."<sup>184</sup> His opinion concerning the deportation of denaturalized aliens who committed offenses during the period of their citizenship, while criticized above on the merits, must receive respect for its execution.<sup>185</sup> On the other hand, *Savorgnan v. United States*, holding, perfectly unobjectionably, that an American citizen had lost her citizenship by becoming an Italian citizen, is prolix and is documented out of all proportion to its negligible significance.<sup>186</sup>

The two most important Burton opinions of the year were the dining car segregation case<sup>187</sup> and the eminent domain case discussed above, in which the government was held liable for damages resulting from raising the stream level of a nonnavigable tributary of the Mississippi River.<sup>188</sup> I have confessed my own difficulty in understanding the purpose of the first half of that eminent domain opinion and just what it decides.

The trouble with these technical considerations is that they take no account of Burton's rugged independence and the integrity of his results. Burton is basically conservative, and he behaves that way; but he cannot be typed. In a half-dozen cases this year, he again illustrated the manner

<sup>181</sup> *Cassell v. Texas*, 339 U.S. 282, 298 (1950).

<sup>182</sup> Discussion, 1948 Term article, 53-54.

<sup>183</sup> *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241, 242 (1949).

<sup>184</sup> *Oakley v. Louisville & N.R. Co.*, 338 U.S. 278, 279 (1949).

<sup>185</sup> *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521, 522 (1950).

<sup>186</sup> 338 U.S. 491, 492 (1950).

<sup>187</sup> *Henderson v. United States*, 339 U.S. 816, 818 (1950).

<sup>188</sup> *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 800 (1950).



in which he reached results which he may strongly have disliked.<sup>189</sup> Burton never prates of impersonality, but he displays that characteristic in marked degree.

The primary interest of the bar this year is of course in the work of the two new Justices. Now that the first year's evidence is in, no very clearcut conclusion can be reached as to the capacities of Justice Clark. His opinions are of average quality, neither particularly good nor bad. Probably the poorest is *United States v. Toronto Navigation Co.*,<sup>190</sup> involving the valuation of a car ferry condemned by the government during the war. The opinion is unnecessarily extensive in its statement of facts, verbose in its description of the central issues, and unilluminating in the nature of the directive which it sends to the court below. One of his best opinions is *Wilmette Park District v. Campbell*, discussing the application of an amusement tax to a local park district.<sup>191</sup>

The principal criticism of the Clark opinions, like any other run of the mine work, is that they were neither original nor penetrating. His cases were decided in terms of the most obvious factors of the precedents or the most clearly apparent materials. An illustration is *Treichler v. Wisconsin*,<sup>192</sup> Justice Clark's first opinion, which invalidates a provision of the Wisconsin inheritance tax law as it applies to the taxation of tangible property of the deceased outside the state. Under a clear precedent, *Frick v. Pennsylvania*,<sup>193</sup> such a tax on out-of-state tangible property violates the due process clause, and the Court so holds.

The opinion contains a most remarkable sentence: "[T]he economic effects of tax burdens in the federal system cannot control our results, limited as we are to the words of the Fourteenth Amendment."<sup>194</sup> The law of due process on state taxation has never purported to be anything

<sup>189</sup> For example, *Powell v. United States Cartridge Co.*, 339 U.S. 497, 498 (1950), holding the Fair Labor Standards Act applicable to employees of private contractors operating government owned munitions plants on cost-plus contracts. I strongly doubt that Burton's inclinations took him to that result; but the law did. He also joined the majority in the following cases which may have been personally difficult: *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (applicability of Administrative Procedure Act to deportations); *United States v. Texas*, 339 U.S. 707 (1950) (tidelands); and particularly *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950) (service on foreign insurance companies with very thin connection of state of service). In the so-called "patriotic cases" the Justice had a slight tendency to wave the flag and let the eagle scream. *Duncan v. Kahanamoku*, 327 U.S. 304, 337 (1946) (martial law in Hawaii); *Lichter v. United States*, 334 U.S. 742, 778 et seq. (1948) (renegotiation). Elsewhere he retains a very calm objectivity.

<sup>190</sup> 338 U.S. 396, 397 (1949).

<sup>191</sup> 338 U.S. 411, 412 (1949).

<sup>192</sup> 338 U.S. 251, 259 (1949).

<sup>193</sup> 268 U.S. 473 (1925).

<sup>194</sup> 338 U.S. 251, 256 (1949).

but a practical judicial adjustment of economic effects.<sup>195</sup> The Court reiterates the traditional "benefit theory" of taxation, resting its result on the fact that Wisconsin gives no "benefit" in return for this tax on foreign property. Yet a footnote concedes that the benefit theory would not be applied if the physical property were abroad, and not in any state, for "so to do would have placed a premium upon the avoidance of all state taxes."<sup>196</sup> But this exception swallows the entire logic of the benefit theory and suggests that it in turn is merely a legal way of talking about the avoidance of double taxation.<sup>197</sup>

The point is that if a court were really "limited to the words of the Fourteenth Amendment" which neither says anything about state taxation nor had any known historical intention in respect to state taxation, one could not decide this case as Justice Clark decided it. There must be some *reasons* why the Court has engrafted the tax limitation into the due process clause. These reasons are obviously economic, though this is denied; and statements suggesting what the reasons may be fit very poorly together.

There is a similar mechanical quality in *Manufacturers Trust Co. v. Becker*,<sup>198</sup> the bankruptcy case discussed above, which never quite touches upon the fundamental difficulties of protecting shareholders while at the same time not handicapping directors in their efforts to raise funds for small corporations.

A Senator from Indiana, assistant to President Roosevelt, and a judge of the seventh circuit for seven years, the new junior Justice, Sherman Minton, brings to the Court a background of amazingly extensive experience. As a Senator he had been the New Deal whip, renowned for his quickness of mind and tongue.

Justice Minton's first year must have brought him some genuine unhappiness. His oldest and warmest friend on the Court was Justice Black. His admiration for Justice Douglas had been warmly and publicly expressed.

<sup>195</sup> A leading analysis, with comprehensive bibliography, is Bittker, *Taxation of Out-of-State Tangible Property*, 56 *Yale L.J.* 640 (1947).

<sup>196</sup> 338 U.S. 251, 257 n. 4 (1949).

<sup>197</sup> The Clark note cites *Southern Pac. Co. v. Kentucky*, 222 U.S. 63 (1911), holding taxable a fleet of steamships owned by a Kentucky corporation, permanently employed on the high seas. As Professor Bittker says, *op. cit. supra* note 195, at 645, "If the due process clause is violated by a tax on railroad cars which receive no police or comparable protection from Kentucky, how can an exception be found in the Fourteenth Amendment to support the taxation of the Southern Pacific Company's ocean-going steamships? The fact that these vessels receive no taxable 'protection' from their ports of enrollment or call in no way increases the 'protection' afforded them by Kentucky."

<sup>198</sup> 338 U.S. 304, 305 (1949).

Nonetheless, he found himself intellectually in most extreme disagreement with those old friends on fundamentals. Since of course he followed his convictions rather than his affections, those differences were frequently expressed.

The principal criticism of Minton's opinions is a marked tendency to assume a point in issue. He retains a little of the legislator's tendency to make a case easier than it is by stating the question so that it admits of only one answer. For example, in one case the Court held that despite the community property law of California, a service man could exclude his wife as a beneficiary under a National Service Life Insurance policy. Justice Minton dissented, putting his position thus: "I cannot believe that Congress intended to say to a serviceman, 'You may take your wife's property and purchase a policy of insurance payable to your mother, and we shall see that your defrauded wife gets none of the money.'"<sup>199</sup> No one is very likely to doubt that Congress did not say "we will see that your defrauded wife" really is defrauded.

Again, in a case involving the Labor Board's interpretation of an extremely obscure passage in its Act, Justice Minton begins his discussion of the point with the words, "The claimed impotency of the contract as a defense here rests not upon any provision of the Act of Congress or of state law or the terms of the contract, but upon a policy declared by the Board." We are then told that the policy of the Congress was different from the policy of the Board, and that its "policy cannot be defeated by the Board's policy."<sup>200</sup>

This makes the case too easy. Obviously if what the Board did really does not rest "upon any provision of the Act of Congress," it cannot be sustained. Equally clearly, the Board cannot substitute its policy for the policy of Congress. The whole question of the case is, what is the policy of Congress? That question remains inadequately analyzed.

This is the only serious criticism which can fairly be leveled at the

<sup>199</sup> *Wissner v. Wissner*, 338 U.S. 655, 661, 663-64 (1950).

<sup>200</sup> *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949). Judge Learned Hand, in an essay on his colleague, Judge Swan, said, in 57 *Yale L.J.* 167, 170 (1947): "In addition he has—so far as it is given to any of us to have it—that merit which perhaps should rank highest in point of style: *i.e.* not to be misled into assuming the conclusion in the minor premise—not to beg the question. I can think of no single fault that has done more to confuse the law and to disseminate litigation. One would suppose that so transparent a logical vice would be easily detected; but the offenders pass in troops before our eyes, bearing great names and distinguished titles. The truth is that we are all sinners; nobody's record is clean; and indeed it is only fair to say that much of the very texture of the law invites us to sin, for it so often holds out to us, as though they were objective standards, terms like 'reasonable care,' 'due notice,' 'reasonable restraint,' which are no more than signals that the dispute is to be decided with moderation and without disregard of any of the interests at stake."

technical aspect of the Minton opinions. There is much to praise. The opinions are very much to the point, and leave no doubt for the lower courts as to what they are supposed to do. Minton is said by friends to have brought to the Court a determination not to write for the ages, but rather to decide the cases clearly and let it go at that. This he does. His best opinion of the year is *United States v. Rabinowitz*,<sup>201</sup> which, overruling an earlier opinion on searches and seizures, does so with great care and precision. Other outstanding Minton opinions are his majority and dissenting analyses in the two picketing cases in which he wrote.<sup>202</sup>

### CONCLUSION

The new directions of 1949-50 have been discussed. One point remains. There has been some criticism of the new Court for the rapidity with which it abandoned what its predecessors stood for. In the *Rabinowitz* case just referred to, Justice Frankfurter strenuously criticized the Court for its overruling of a case only two years old:

Respect for continuity in law, where reasons for change are wanting, alone requires adherence to *Trupiano* and the other decisions. Especially ought the Court not re-enforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.<sup>203</sup>

The criticism seems unfair. We cannot escape the fact that in the highest Court, the law is necessarily what the judges say it is and basic changes of personnel inevitably bring changes of doctrine and theory. It is perfectly fitting that this should be so. President Roosevelt is dead. His choices of Justices could not last forever. A new President having been elected, it is to be expected that the Court should adjust to new ways. As a result, the New Deal era in jurisprudence is gone. Those of us who regret the passing of the Roosevelt era from the Supreme Court can do so on far stronger ground than a mere attachment for *stare decisis*. We have all too much to lament on the merits.

### APPENDIX

The list following is an illustrative sampling of certioraris denied.

#### CIVIL RIGHTS CASES

(a) No. 10, Misc., *Snell v. Mayo*, 173 F. 2d 704 (C.A. 5th, 1949). Defendant, held incommunicado ten days, attempted suicide; while weak from loss of blood,

<sup>201</sup> 339 U.S. 56, 57 (1950).

<sup>202</sup> *Building Service Employees v. Gazzam*, 339 U.S. 532, 533 (1950) (majority); *Int. Brotherhood of Teamsters v. Hanke*, 339 U.S. 470, 481 (1950) (dissent).

<sup>203</sup> 339 U.S. 56, 86 (1950).

he allegedly made certain statements which sheriff overheard and repeated in court. The lower court held that "the confession or admission testified to by the sheriff was overheard and not extorted."

(b) Nos. 221-222, Misc., *In the matter of Marino*, 404 Ill. 35, 88 N.E. 2d 7, 8 (1949). Two years ago the United States Supreme Court held that Marino, a recent immigrant who spoke no English and who was tried for a serious offense without an adequate interpreter and without counsel, had been denied due process. Illinois, the state of his conviction, confessed error. The lower court in Illinois nonetheless, on remand, refused to release him in an unreported decision. The Supreme Court then denied certiorari. The matter then proceeded to the Illinois Supreme Court, which in the case cited conceded that it was res adjudicata that "defendant was denied 'the due process of law which the 14th Amendment requires'"—but found that it was powerless to take any action. The Supreme Court again denied certiorari.

(c) No. 387, 388, Misc., *Ex parte Quillian*, 89 N.E. 2d 493, 494 (Ohio, 1949). Escaped prisoners held to have no right to raise issues of fairness of trial on extradition proceedings. Justice Douglas dissented from the denial.

(d) No. 255, *Hall v. United States*, 176 F. 2d 163 (C.A. 2d, 1949). Communist defendants, held in contempt for disturbance in open court; unusual penalty assessed. Justice Black dissented from this denial.

(e) No. 168-169, *International Union, UMW v. United States*, 177 F. 2d 29 (App. D.C., 1949). Fines double those of the earlier United Mine Workers case were assessed for contempt of district court's no-strike order. It was alleged, in part, that these fines had now become so enormous as to be a cruel and unusual punishment. Justices Black, Reed, and Douglas dissented from the denial of the writ, and Justice Clark did not participate.

(f) No. 430, *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (C.A. 5th, 1949). The issue was whether the Army could arrest a civilian in Texas who had allegedly, as a civilian in Germany, escaped after being under arrest in Germany. The fifth circuit denied habeas corpus.

(g) No. 398, *Pedigo v. Celanese Corp.*, 205 Ga. 371, 392, 493, 499, 514, 54 S.E. 2d 221 et seq. (1949). Alleged contempt of injunction restraining mass picketing. Justice Black dissented from the denial of certiorari.

(h) No. 509, *Buteau v. Connecticut*, 136 Conn. 113, 68 A. 2d 681 (1949), validity of confession in case in which defendant was held illegally for seven days in a police barracks, the state court finding, however, that "every consideration was shown to the defendant which one arrested for a first degree murder could have reasonably expected."

(i) No. 494, *Schoeps v. Landon*, 177 F. 2d 391 (C.A. 9th, 1949), a one day trip from California to Mexico and return held to amount to an "entry" under a criminal provision of the immigration laws, although the alien making the excursion had lived here twenty years. (It may be observed that he was an obscenely unpleasant alien.)

(j) Nos. 197, 248, and 249 [see 176 F. 2d 473 (App. D.C., 1949)], *Marshall, Lawson & Trumbo v. United States*. The congressional authorization of the House Un-American Committee, and its works, held lawful. Justices Black and Douglas dissented.

(k) No. 284, *Lapides v. McGrath*, 176 F. 2d 619 (APP.D.C., 1949), a statute providing that naturalized citizens shall lose their citizenship upon five years residence abroad held valid as against challenge that it makes an unconstitutional distinction between naturalized and native-born citizens.

The foregoing cases all involved refusals to hear cases at the behest of the individual whose liberties had allegedly been invaded. In No. 300, *Maryland v. Baltimore Radio Show*, 67 A. 2d 497, 509 (1949), the Court declined to review a Maryland decision which reversed a contempt order of a trial court against a local radio station. Justice Frankfurter filed an extended statement concerning this matter.

#### NONCIVIL RIGHTS CASES

(a) No. 92, *Turner Glass Corp. v. Hartford Empire Co.*, 173 F. 2d 49 (C.A. 7th, 1949). The lower court held that a licensee of patent rights under a system of agreements held to be illegal in a suit between the United States and the licensor could not recover the amount of the license fees paid in the absence of showing special damages. Justice Black dissented from the denial.

(b) No. 331, *Falkenberg v. Bernard Edward Co.*, 175 F. 2d 427 (C.A. 7th, 1949). The lower court held that the Supreme Court's so-called "flash of genius" test was not meant to raise the level of invention in any way.

(c) No. 488, *National Maritime Union v. NLRB*, 175 F. 2d 686 (C.A. 2d, 1949). Taft-Hartley anti-hiring hall provisions held valid.

(d) No. 358, *Casselman v. Idaho*, 69 Idaho 237, 205 P. 2d 1131 (1949). Idaho secondary boycott act held valid. Justices Black, Reed and Burton dissented from the denial of certiorari.

(e) No. 400, *Fifth and Walnut v. Loew's, Inc.*, 176 F. 2d 587 (C.A. 2d, 1949). The judgment in *United States v. Paramount* was held not "final" and hence not usable in evidence under the Clayton Act in the many movie treble damage cases.

(f) Nos. 592, 593, *United States v. Pevely Dairy Co.*, 178 F. 2d 363 (C.A. 8th, 1949). Evidence held insufficient to sustain conviction of defendants for monopolizing milk sales in the St. Louis area.

(g) No. 653, *Stone v. Reichman-Crosby Co.*, (Miss., Nov., 1949). The Mississippi Supreme Court invalidated a provision of the state's use tax requiring non-resident seller to collect tax from Mississippi customers.